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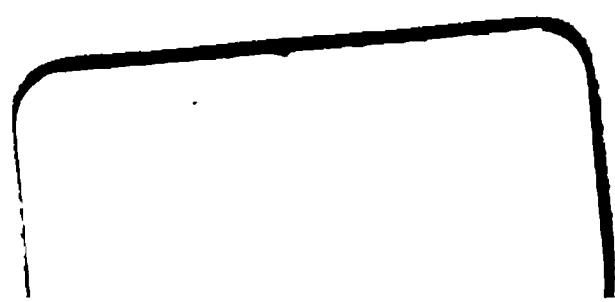
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English Republic

2218

A
DIGEST
OF
THE LAWS OF ENGLAND.

VOL. III.


A

DIGEST
OF
THE LAWS OF ENGLAND.

BY THE RIGHT HONOURABLE
SIR JOHN COMYNS, KNIGHT,
LATE LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

THE FIFTH EDITION, CORRECTED,
(*WITH CONSIDERABLE ADDITIONS TO THE TEXT*)
AND CONTINUED FROM THE ORIGINAL EDITION TO THE PRESENT TIME;
TO WHICH IS ADDED,
A DIGEST OF THE CASES AT NISI PRIUS,
BY ANTHONY HAMMOND, Esq.
OF THE INNER TEMPLE.

THE FIRST AMERICAN, FROM THE FIFTH LONDON EDITION.
WITH THE ADDITION OF
THE PRINCIPAL AMERICAN DECISIONS.
BY THOMAS DAY, Esq.

VOL. III.
CHARTERS—ESSOINE.

PHILADELPHIA :
J. LAVAL AND SAMUEL F. BRADFORD,
AND
COLLINS & HANNAY,
NEW-YORK.

.....
1825.

SOUTHERN DISTRICT OF NEW-YORK, ss.

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JAMES DILL,
Clerk of the Southern District of New-York.

E. & G. Merriam, Printers,
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A

DIGEST

OF THE

LAWS OF ENGLAND.

[The figures in this work refer to the original pages as numbered at the bottom.]

CHARTERS.

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(A) TO WHOM THE PROPERTY OF THEM BELONGS.

IF a man seised in fee conveys land to another and his heirs without warranty, all the charters belong to the feoffee as incident to the land, whether they comprise warranty or not; for the feoffor has no use for them, but the feoffee must defend his title at his peril. R. 1 Co. 1. a.

And all charters belong to the feoffee without warranty, though they be not granted by the conveyance. R. 1 Co. 1. a.

So, in all cases, the charters, muniments, and evidences of land belong to him who has the inheritance of the land, as incident to it, if another person be not bound to warranty.

And, therefore, if A. enfeoffs B. by the word (*dedi*), which imports a warranty during the life of the feoffor, after his death B. shall have all the charters. 1 Co. 2. b.

So, if a man enfeoffs another with warranty, who dies without an heir, the lord by escheat shall have all the charters; for he is in the post, and the feoffor is not bound to warrant him. 1 Co. 2. a.

So, if a feoffment be to two and their heirs, the survivor shall have all the charters, &c. and not the heir of him who died; for he has no use for them. 1 Co. 2. b.

So, charters, &c. which are necessary to maintain his title to the possession, belong to him who has the land, though another be bound to warranty; as if a thing which lies in grant, as a seignior, rent, &c. be granted with warranty, the grantee shall have the first deed; for it is necessary to

make his title against the grantor himself, or any claiming under him. R. 1 Co. 1. b.

So, if a feoffment be made of land with warranty, the feoffee shall [*] have court-rolls, &c. which concern the possession only, and not the title. 1 Co. 1. b.

So, if the feoffor grants the charters to the feoffee by his conveyance, the feoffee shall have them, though the feoffor be bound to warranty. 1 Co. 1. b.

If a grant be by indenture, every one ought to have his part; for every one who pleads it ought to produce it for that which belongs to him. Co. L. 143. b.

And, therefore, if only one part be executed, it shall be deposited in the hand of a common friend. Co. L. 143. b.

But if a man makes a feoffment with warranty, without a grant of the charters, he shall have all the charters and evidences which contain warranty, or are necessary to deraign the warranty paramount, or are material for the maintenance of the title of the land; for the feoffee relies upon his warranty. R. 1 Co. 1. b. Co. L. 6. a.

So the heir of the feoffor shall have them, though he has nothing by descent; for he may be vouched. R. 1 Co. 1. b.

So the feoffor shall have them, though the feoffee, as assignee, may vouch those who are bound to warranty paramount; for he may also vouch the feoffor if he pleases. R. 1 Co. 1. b. (a)

(B) DETINUE OF CHARTERS.

(B 1.) When it lies.

If a man detains charters, which concern the inheritance of another, he may have detinue of charters against him. Co. L. 286. b. Vide Detinue, (A). Vide Pleader, (2 X 1, &c.)

So, if he detains a statute, obligation, release, articles of agreement, testament, &c. Reg. 159. b.

So a man may have detinue for any charters, which make his title sure. F. N. B. 138. K.

As, if A. lease for years, and afterwards confirm the estate to the lessee and his heirs; the heir shall have detinue for the lease; as well as for the deed of confirmation. Ibid.

If the donee in tail die without issue, the donor shall have detinue for the deed which the donee had. F. N. B. 138. F.

If a feoffment be to A. and B. and the heirs of B., and A. dies; B. or his heirs shall have detinue for his deed. Ibid.

(a) 1. Part of an estate is mortgaged with the title-deeds; the remaining part is sold, with a covenant from the vendor to the vendee to produce the deeds at any time when required. Afterwards, the mortgaged premises are assigned to the vendee, and with them the deeds; who again assigns the mortgaged premises to another, without mentioning the deeds. Held, that as the mortgagor being owner still of the other part of the premises, had as good a right to the deeds as the mortgagee, since they were not assigned, the mortgagee could not dispossess him by action. 2 T. R. 708.—2. Where, under a sale conditioned to be void if the vendor cannot make a good title, an abstract of his title is delivered to the vendee, the vendee has a right to retain, and may have trover for it against the vendor, until the matter is settled past dispute. 2 Taunt. 268.—3. A. sells an estate to B., who pays part of the purchase-money, and the title-deeds are deposited with C. to be delivered up to B. when he pays the residue. A. gets possession of them again, and pledges them to D. for a valuable consideration. Held, that B., on tendering the remainder of the purchase-money is entitled to recover the deeds from D. 1 Mars. 414. 6 Taunt. 12.

[*]So the issue in tail shall have detinue against the discontinuee, for the deed of entail. F. N. B. 138. H.

Detinue of charters, bailed or found in the life of the ancestor, ought to be brought by the heir, and not by the executor or administrator. F. N. B. 138. I.

And it may be brought by the heir, though he has not the land ; as if A. being enfeoffed with warranty, enfeoffs B. with warranty ; the heir of A. may have detinue for the deed of the first feoffment. F. N. B. 138. L.

So the heir of the disseisee may have detinue for the charters, before entry. F. N. B. 138. L.

(B 2.) What shall be the proceeding.

Detinue of charters concerns the realty, and therefore shall be brought only in C. B. F. N. B. 138. B. C. Reg. 159. b.

Or in the county by justices. F. N. B. 138. B. Reg. 159.

And if it be brought in B. R. or any other court, a *supersedeas* lies. F. N. B. 138. C.

There shall be summons and severance, as in other real actions. Co. L. 286. b.

But a *capias* does not lie, nor process to outlawry, as in detinue for goods. Co. L. 286. b.

The declaration in detinue for charters ought to be certain, as well as detinue for goods. Vide Pleader, (2 X 2.)

And, therefore, it ought to shew the certainty of the charters demanded, and what lands they concern, except where they are in a bag sealed, or a chest locked, and then it is not necessary. Co. L. 286. b. Reg. 160. a.

So it ought always to mention the certain number. Reg. 159. b. 160. a.

And if they are in a chest or bag sealed, it may also mention the certainty, if it be known. Bro. Ent. 148.

At least it is proper to describe one of the charters with certainty, if it may be, and then the defendant cannot wage his law. Co. L. 286. b.

But if the declaration mentions the bag to be sealed, or the chest to be locked, it is sufficient, though it be not so ; for it is not traversable. Reg. 160. a.

(B 3.) Plea in detinue for charters.

To detinue for charters the defendant may plead *touts temps prist*. Vide Pleader, (2 X 3, &c.)

So the defendant may plead, that the charters were delivered by the plaintiff and a stranger *aqua manu*, upon conditions which he knows not whether they are performed, and pray that the stranger may be warned. Vide Pleader, (2 X 8.)

Vide Pleader, (2 Y 6.)

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(A) FOREST.

(A 1.) What shall be.

A forest is a place of wood and pasture distinguished *metis & bundis* for the custody of beasts and birds of the forest, (viz. hart, hind, hare, boar, and wolf,) the chase, (viz. buck, doe, fox, martron, and roe,) and the warren, (viz. hare, coney, pheasant, and partridge,) and replenished with vert and venison, for the preservation of which peculiar laws, privileges, and officers belong. Manw. 40. 4 Inst. 289. 298.

A forest comprehends in it a chase, park, and warren. Manw. 52.

And may be made by act of parliament. 4 Inst. 301.

Or the king, by commission to the sheriff or commissioners, may order, that they make a perambulation in such a country, and so much as appears to be convenient for a forest, that they surround it by meers and bounds. Manw. 57.

And upon the return of such a commission into chancery, the king may issue a writ to the sheriff reciting the former commission and return, and

commanding him that he proclaim it throughout the country to be a forest. Manw. 59.

And if after a writ to proclaim it, and a return of it, the king grant proper officers and courts, it commences a forest. Manw. 60.

So the king may claim a forest by prescription. 4 Inst. 301.

And it may be claimed by prescription in the lands of a subject, for it might have a lawful commencement. Ibid.

(A 2.) Who shall have it.

But none can make a forest, except the king. Manw. 71.

So the king cannot make a forest in the lands of a subject without his consent. 4 Inst. 301. Semb. cont. Manw. 55.

And it is not proved a forest by being called a forest in records, &c. but by having courts, and officers, &c. 4 Inst. 298. R. 12 Co. 22.

[*]So by the st. 16 Car. 16. the meers, limits, bounds, &c. of every forest shall not extend beyond what were taken to be so. 20 Jac. 1.

And no place shall be taken to be forest or within a forest where no justice seat, swainmote, or court of attachments had been held, verderors chosen, or regard made within 60 years before the reign of Charles 1.

Yet the king may by express words grant a forest to a subject. Co. L. 233. a. Manw. 72. 75. per two Judg. cont. 1 Roll. 112.

And by such grant of a forest *cum omnibus incidentibus, appendiciis, & pertinentiis*, the subject shall have the forests with all courts, and officers, except the justice in eyre. Manw. 76. 78. 81. R. 2 Cro. 155. 1 Bul. 296.

So by express words, the king may grant to a subject to have *jura regalia* to make a justice in eyre, &c. Manw. 76.

But if a forest be parcel of a manor, by a grant of the manor *cum pertinentiis* to a subject, the forest does not pass. R. Pal. 60. 92.

(B) CHASE.

What shall be.

A chase is the same liberty as a park, save that it is not inclosed. Manw. 52.

And therefore, a chase has no officers or courts, as a forest has. Ibid.

And offenders there shall not be punished by the laws of the forest, but by the common law, or statutes. Ibid.

A free chase may be claimed by grant, or prescription. 1 Rol. 112.

It may be claimed in his own wood, as appurtenant to his manor. 4 Inst. 318.

Or within a forest. Jon. 278.

So by prescription, it may be in the soil of another.

It may be claimed for red-deer by special licence. Jon. 278.

If the king makes a commission to inclose a forest, and it be proclaimed a forest, it shall be only a chase till the proper officers and courts are granted. Manw. 60.

If the king grant a forest to a subject without the words, to have courts and officers of a forest; it shall be only a chase in the hands of a subject. Manw. 80. R. 2 Cro. 155. D. Pal. 89, 90.

But none can make a chase, or a park within his own land, or elsewhere, without the king's grant. Manw. 56. 2 Inst. 199.

And if he does so, a *quo warranto* lies. Manw. 56.

[*6]

So the owner of a chase shall be fined, if he kill a beast of the forest, or refuse to drive back a beast of the forest out of the chase. Jon. 278,

(C) PARK.

A park is a territory inclosed, which has a privilege for beasts of chase, by prescription, or the king's grant. Co. Lit. 233. a. 2 Inst. 199. Bridg. 26.

And it may be within his own soil.

Or by the licence of the king, or the owner of the forest within the limits of a forest. Manw. 85. 89. 90. Bridg. 26.

But such as would purchase a new park or warren should sue a writ of *ad quod damnum* out of chancery; and the inquests shall be returned [*] into the exchequer, and if they pass for him that purchased the writ, he shall make fine for having the park or warren, and it shall be certified to the chancellor or his deputy that he take a reasonable fine therefor and afterwards make delivery. St. 27 Ed. 1. st. 1. *de libertatibus perquirendis*.

And if such park in a forest be laid down for several years, it may afterwards be inclosed *de novo*. Manw. 82. R. 2 Cro. 156.

And the owner of the park may kill any beasts which he finds in his park, though they come out of the forest. 2 Cro. 156.

But a park within a forest ought to be inclosed, to prevent beasts of the forest from coming into it. Manw. 90. R. Bridg. 26.

And the owner may dispark his park, if he grants or destroys all the venison, vert or inclosure. R. Cro. Car. 60.

(D) WARREN.

A free warren is a privilege, which a man claims by grant, or prescription, to have beasts of a warren in his land, or demesnes, *ita quod nullus intret ad fugandum vel capiendum quod ad warrennam pertinet*. 2 Rol. 812. l. 5. to 20.

A warren is a privilege distinct from the land, and by a lease of the land, without more, does not pass. Dy. 30, in marg.

Nor, by an alienation of the land, without saying, *cum pertinentiis*. Dy. 30. b.

Or if it be said, *cum pertinentiis*, where he has a warren by grant, not by prescription. Dy. 30. b. in marg.

So it may be granted or claimed, within a free chase of the king, 4 Inst. 298. 12 Co. 22.

And the grantee may there build a lodge upon his own inheritance. 4 Inst. 298,

So it may be claimed in a forest of the king. R. Manw. 81. R. 2 Cro. 155. Jon. 280. 296.

And though it have not been used for many years, the prescription shall not be destroyed. Manw. 81. 2 Cro. 155. Vide Liberties, (C 2.)

If there be a warren by charter within his manor, he may make burrows, and build a lodge in any part of the manor *de novo*. Manw. 82. 12 Co. 22. R. 2 Cro. 156.

If it be claimed by prescription, he ought to make them in the ancient place. Ibid.

But a man cannot prescribe for a warren in the lands of a stranger, which are not within his seignory. 2 Rol. 265. l. 52,

And if the king grants to B. a warren within his manor, he shall have it only in the demesnes, not in the land of the freeholders. Cro. El. 463.

So none can make a warren in his own land without the king's licence, because he cannot appropriate to himself *feras naturæ*, which are *nullius in bonis*. 2 Rol. 812. l. 25. 11 Co. 87. b. 2 Inst. 199.

(E) BEASTS OF THE FORESTS, AND CHASE.

There are five beasts which are properly beasts of forest, or venary; viz. the hart, hind, hare, boar, and wolf. Manw. 91. 8 Co. 138. b.

[*]The hart is so named when in his sixth year, being called in the first year, hindcalf or calf, in the second brocket, in the third spayard, in the fourth staggart, in the fifth stag, in the sixth hart. Manw. 98.

After being chased by the king, it is an hart royal; and if a proclamation goes for his return to the forest after the chase, a hart royal proclaimed. Manw. 99.

The hind in the first year is called calf, in the second brocket's sister, in the third a hind. Manw. 100.

The hare is a leveret in the first, an hare in the second, and a great hare in the third year. Ibid.

The boar in the first year is a pig of the sounder, in the second an hog, in the third an hog stear, in the fourth a boar. Ibid.

So there are properly five beasts of chase, or park; viz. buck, doe, fox, martron, and roe. Manw. 94. Co. L. 233. a. 8 Co. 138. b.

Every beast of forest and chase is properly called venison (*venatio*). Manw. 111,

And therefore, if any kill an hare within a forest, he shall answer for a trespass upon the venison of the forest. Ibid.

And every trespass to the forest is to the vert, or venison. Manw. 112.

(F) BEASTS OF THE WARREN.

So beasts of warren are properly two; viz. hare and coney. Manw. 95.

But Co. L. 233. a. names a roe to be a beast of warren. Hare and coney are named. 8 Co. 138. b.

The fowls of warren are only pheasant and partridge. Manw. 95. 8 Co. 138. b.

But *volucres compestres*, as quail, raile, &c. and *silvestres*, as woodcock, &c. and *aquatiles*, as herne, mallard, &c. are also named fowls of warren. Co. L. 233. a.

But the lord of a manor may prescribe, for himself and his tenants, to take fowl in the warren of another. R. 3 Mod. 246.

So he, who has a warren in a forest, must keep it well inclosed, that the conies do not escape into the forest. Jon. 296.

(G 1.) MEERS OF A FOREST.

Every forest and chase ought to be distinguished by meers and limits, without which it cannot be a forest. Manw. 48. 123. 4 Inst. 289. 317, 318.

And the meers are parcel of the forest. Manw. 131.

And by the st. *de ass. & cons. for.* 6 Ed. 1. *Omnes metæ forestæ sunt integræ domino regi.* Manw. 130, 131.

And therefore, every beast of forest killed in the highway, river, &c.

[*8]

being the meers of the forest, shall be an offence of the same nature as if he was killed within the forest. Manw. 131.

But the king has no other interest in the soil of such highway, &c. but that arising from the jurisdiction of the forest. 4 Inst. 318.

And there are two kinds of metes and bounds, the one inclusive as to jurisdiction, such as highways, &c. the other exclusive in that respect, as churches, church-yards, chapels, mills, houses, trees, &c. [*]which bound the forest, but are not within the jurisdiction. 4 Inst. 318.

But a manor, land, wood, &c. within the meers of the forest, by the king's charter may be exempted out of the regard of the forest. Manw. 133.

Yet it shall not be exempted by prescription; for by the st. 6 Ed. 1. meers are established, and there can be no prescription since. Jon. 271.

(G 2.) Perambulation.

When a *perambulationi facienda* lies, vide Pleader, (3 G.)

(H) HUNTING, OR HAWKING IN A FOREST.

(H 1.) Who may do it.

None can hunt, or hawk within a forest, except the king, or by the king's warrant or authority. But the king himself may do it.

So by *charta de foresta*, 9 H. 11. an archbishop, bishop, earl, or baron coming to the king, at his command, or in return by a forest, may take and kill one or two deer there by view of the forester, or, if he be absent, he shall blow an horn.

So every one who has a licence from the king or a subject to hunt, &c. within his forest, chase, park, &c. may do it. Manw.

Though the licence be only by parol. Manw. 289.

So, if he is entitled to have a deer, &c. as a fee incident to his office; for that is a licence in law. Manw. 285.

So every one, who has a grant or charter, of the king, allowed in the eyre for hunting or hawking within a forest. Manw. 275.

And if the licence be for hunting, killing, and carrying away, he may hunt there with servants and others; for he has an interest in the thing. Manw. 278. R. 13 H. 7. 13. a. b.

So, if he has a warrant to a forester, &c. to deliver him a buck, he may with himself and servants hunt the buck with the forester. Manw. 279. R. 13 H. 7. 13. a.

If he has a licence for him and his servants to hunt at his pleasare, he may also kill and carry away; for the licence for the servant imports an interest in the thing. Manw. 279, 280.

(H 2.) Who not.

But none can hunt or hawk within a forest without the king's authority. Manw. 275.

Though it be within his own land, or manor in the forest. Manw. 276.

So every one who receives within a forest a malefactor in the forest or venison of the king, knowing him to be so, will be a principal trespasser. 4 Inst. 317.

So a bishop or baron cannot hunt there, except in his journey to the king, [*9]

by his command, and in view of the forester, or when he sounds an horn. Manw. 276.

So an officer, who is entitled to a deer for his fee, &c. must have a warrant; and if the forester, &c. refuse or omit to deliver it, he may hunt [*] by himself and his servants, but not before serving the warrant upon the forester. Manw. 284.

So, if any one, who has the king's licence or warrant, does not pursue his licence, it will be a trespass *ab initio*. Manw. 277. 280. 288.

As, if the licence be for killing a buck, &c. he cannot kill another deer. Manw. 277.

If it be only for killing, he cannot afterwards carry it away. Manw. 277. 279.

If it be to a knight, &c. for hunting, without more, he cannot hunt with his servants or other company; for it is a matter of pleasure only. Manw. 278. R. 13 H. 7. 13. b.

Or for hunting and killing for the honour of the owner. Manw. 277.

Nor can he assign his licence to another. Manw. 278, 279.

So a licence for hunting in a chase, park, or warren must be pursued in the very manner. Manw. 277, &c.

(H 3.) By whom a licence may be given.

So none can hunt, &c. within a forest, unless he has a licence from the proper person; for a licence from the forester, keeper, &c. does not avail. Manw. 281.

But the licence must be by the king himself. Manw. 280, 281.

Or by prescription, which supposes a grant of the king; as where an officer has a buck, &c. as a fee.

So justices in eyre may give licence to any to hunt, &c. within his own manor, or land in the forest. Manw. 281.

So a man, who by a charter, or grant of the king, has authority within a particular part of the forest, may give licence to another within such precinct. Ibid.

So, if a subject has a forest, he may licence another to hunt, &c. in it. Ibid.

(H 4.) How hunting, &c. there shall be punished.

By the const. Canuti. 22, 23, 24, 25, (which are suspected, 4 Inst. 320.) the penalty of hunting in a forest was 10s. for a freeman, double for killing, in another man double, in a villein, death. Manw. 3.

By the st. *ch. de for.* 9 H. 3. 10. no man shall lose life or member for killing our deer; but if taken therewith and convict for taking our venison, he shall make grievous fine; or, if he hath nothing, he shall be imprisoned a year and a day, and then delivered, if he can find sufficient sureties, otherwise abjure the realm.

By the st. *de mal. in parcis*, 3 Ed. 1, 20. if any be attainted for trespass in parks and ponds at the suit of the party, large amends shall be made, three years imprisonment, fine at the king's pleasure, and surety not to offend after; if not able to fine, or find surety, he shall abjure, &c.

If none sue within a year, the king shall have the suit.

So by *ord. for.* 6 Ed. 1. *Si quis ceperit feram sine warranto in foresta, arrestetur, &c. infra metas forestæ, et non deliberetur sine præcepto domini regis, vel capitalis justiciarii forestæ.* Manw. 291.

[*10]

[*]And therefore, every one taken in the manner within a forest may be arrested by the forester, and imprisoned till delivered by an *homine replegiando*, or a precept of the justice in eyre. Ibid.

And if bail be given upon the *homine replegiando*, or such precept, he may afterwards be indicted and fined at the discretion of the chief justice of the forest, and imprisoned till payment of the fine, and giving surety for his good behaviour in the forest thenceforth. Manw. 293.

So he may be arrested within the forest, and imprisoned, if found in hunting there, though he takes or kills nothing. Manw. 291.

So if he be found in the manner in any respect, viz. stable stand, dogdraw, blackbear, or bloody hand. Manw. 292.

As if he be taken with a gun, dog, &c. to kill deer. Ibid.

Or after killing it pursue with a dog, carry it on his back, or be stained with blood, though he be not seen in hunting. Ibid.

So if he enter with intent to hunt, and if found with a bow, dog, &c. though he does nothing; for the will is taken for the deed. Ibid.

But the chief justice in eyre by his warrant to a messenger cannot apprehend any accused upon oath before him of hunting in the forest, if he be not indicted, nor found in the manner. R. Carth. 78.

(H 5.) By action at common law.

So for hunting in a chase of the king, or of another, he may be sued by an action at common law. F. N. B. 67. D.

So for hunting in a forest, park, &c.

So for hunting in his close, and killing a deer there. 10 H. 7. 6 b. 30. a.

And the plaintiff shall recover damages for the value of the deer, though no value is mentioned in the declaration, as well as for entering his close. 10 H. 7. 6.

So for hunting in a park, he may be sued within a year, by an action upon the st. W. 1. 20. *de malefactoribus in parois*. Reg. 80. b. 111. b.

And by the king after a year and a day. Reg. 80. b.

And the plaintiff may sue for trespasses in several parks together. R. 13 H. 7. 12. b.

But an action does not lie upon this statute, except for hunting in ancient parks. By the better opinion. Dal. 60.

Nor for hunting in a forest or chase. Semb. Reg. 80. b.

So to trespass in a park, the defendant may plead a feoffment, &c. to A. before the trespass, and that he by the command of A. hunted, &c. 13 H. 7. 13. a.

A licence by the plaintiff to B. and the defendant as his servant with the parker took it. Ibid.

(I) THE PURLIEU OF A FOREST.

(I 1.) What shall be.

Purlieu or pourluy, is a contraction or corruption of the word *pourallee*, which imports a perambulation. Manw. 365.

For in the time of H. 2. R. 1. and John, many lands adjoining to the king's forests were incroached within the forest, which by *charta de foresta* l. 3. made 17 John, and confirmed 9 H. 3. were to be disafforested, [*]and afterwards by perambulations made in the time of Edw. 1. and Edw. 3.

[*11] [*12]

disafforested; and the lands so disafforested are named the purlieu or *pourallee*. Manw. 319. to 365. (b)

And therefore, the purlieu of a forest is land adjoining to a forest known by meers immoveable upon record, which was within the forest, but is now disafforested. Manw. 318.

And the purlieu is exempt from the forest; for it is *infra metas*, not *infra regard' forestæ*. Manw. 87.

The owner may cut down his wood, plough or improve his land, without licence.

But by *ch. de for.* 9 H. 3. 1. *forestæ quas H. 2. afforestavit, &c. ad dampnum illius cujus boscus, &c. fuit, deafforestentur.*

And therefore the purlieu was disafforested only for the benefit of the owner, and as to others, it remains within the forest. Manw. 366. (c)

And the owner may suffer his wood to be now within the forest.

So beasts of the forest may haunt within the purlieu, and none can chase them there, but the owner of the soil.

And the owner of the soil cannot kill them. Jon. 278.

(I 2.) Who may hunt within a purlieu.—The owner of the soil.

The owner of the land or wood within a purlieu, may hunt with dogs beasts of the forest found in his soil, towards the forest; so that he does not forestall, or foreset them in their return.

And if he finds them in his own soil, he may chase them towards the forest by the land of others.

And every owner of land within a purlieu may chase them towards the forest with a small dog.

So if he be a purlieu man, viz. if he have a freehold of 40s. per annum within the purlieu, he may chase them with a greyhound, or bigger dog. Manw. 371.

And he may kill them before they pass the limit, or brink of the forest.

And he may take the deer, &c. killed to his own proper use.

So if a dog fasten upon a deer, &c. before she gains *filum forestæ*, and she drags the dog into the forest, and there is killed, the owner may pursue, and take the deer out of the forest.

So if a purlieu man pursue deer towards the forest, and by an horn, &c. call off his dogs before they enter into the forest; he is no trespasser, though the dog pursue and kill the deer within the forest, if he himself does not enter the forest, nor take the deer.

But a man, who has land within a purlieu, cannot by gun, cross-bow, hay, or other engine, forestall or foreset the beasts of the forest in their return to the forest. Manw. 384. 373.

[*]Nor can he kill unseasonable game within the purlieu; as a deer of antler in winter, or doe in summer. Manw. 384.

Nor at an unseasonable time; as in the night, or *die dominico*. Manw. 380.

(b) There is a distinction between *purlieu* and *pourallee*: the former meaning the place disafforested and exempted, the latter being the perambulation by which the disafforestation is made. 4 Inst. 303.

(c) But the words *ad dampnum illius, &c.* were added only to shew the unlawfulness of the afforestation; in the 3d chap. which relates to the afforestations in the reigns of R. 1. and king John, these words do not appear, and consequently these latter afforestations are made void as to all men; and if the former be not so, a distinction must be maintained between the two classes. 4 Inst. 303.

[*13]

Nor in the fence-month, which begins fifteen days before midsummer, and ends fifteen days after midsummer. Manw. 381.

Nor above three days in a week. Manw. 381, 2.

Nor within forty days after the king has made a general hunting within the adjoining forest. Manw. 382, 3.

Or within forty days before the time proclaimed for the king's hunting within the forest. Manw. 383.

Or during the time when an officer of the forest is in the execution of a warrant for taking a deer, &c. within the forest adjoining. Ibid.

So he can hunt only with his own servants within the purlieu, and not with other company. Manw. 382.

(K) COMMON NUISANCE.

So any thing, which will be a nuisance by law, if done out of the forest, if it be done within it, will be a nuisance to the forest.

As if one erect cottages there without licence ; though it be for the poor of the parish. Jon. 269.

If he incloses a lane within the forest. Ibid.

If he sets up a ferry, where none was before ; for the deer may be the more easily carried away. Jon. 274.

If he carries a gun in the forest with intent to kill deer. Jon. 275.

Or conceals the killing. Ibid.

If he burns heath, furze, &c. within the forest. Jon. 276.

If he builds a wall, whereby the highway is straitened. Jon. 277. unless it appear *per ministros forestæ quod est competens passagium*.

If beasts damage the wood of B. within a forest, though B. ought to maintain the fence ; for the owner of the beasts ought to request B. to make up the fence ; and if he does not, he ought to do it himself, and shall have an action upon the case for it against B. Jon. 277.

If he erects a windmill within the forest, though it be upon his own soil. Jon. 293.

But by a licence from the justices in eyre, an inclosure may be made, a cottage erected and arrented *in perpetuum*, if the licence be *sedente curia*. otherwise it may be re-seized. Jon. 277.

(L) PURPRESTURE.

So if a man by building, inclosure, or using any liberty or privilege, without warrant, incroach upon the rights of the forest, it will be purpresture and an offence to the forest.

(M) OTHER OFFENCES IN THE FOREST.

Keeping of dogs not expeditated.

Every offence, which tends to the destruction of the forest, or the vert or venison of the forest, or is a breach of the laws of the forest, will be a nuisance to the forest. Manw. 266.

[*]And therefore, not only the hunting, or killing of beasts of the forest which destroys the venison, *de quo vide ante*, (H 1. &c.) and waste, purpresture, or assart, which destroys the vert (*de quo vide ante*, L, and post, N 1. &c.) but any thing which tends to such destruction, and is prohibited by the laws of the forest, will be a nuisance to the forest. Manw. 267.

And therefore, by *ch. de for.* 9 H. 3. 6. he whose dog is not found expeditated, shall be amerced 3s; and inquiry or view for lawing of dogs within the forest shall be made, when the regard is made, viz. every third year, by the view and testimony of honest men, and not otherwise.

And such lawing shall be done by the assize commonly used, viz. three claws of the forefoot shall be cut off by the skin. And, *ex pede*, this is called expeditating. Manw. 265. 255.

And therefore, without the king's grant, no person can keep a mastiff within a forest, unless he be expeditated; for the word dog is intended of a mastiff only. Manw. 249.

Nor any dog of the mastiff kind. Manw. 251.

Nor can he prescribe for it, without shewing the king's charter. Manw. 246.

Nor any dog for hunting. Semb. Skin. 100.

So without the king's grant, none shall keep a greyhound or spaniel within a forest, though it be expeditated. Manw. 246.

And the patentee cannot prescribe to be quit of lawing dogs, as an abbot, &c. was quit. Jon. 271.

The regardors must present every mastiff, not expeditated, and the owner, at the court of attachments, and by the judgment of the court every one shall be expeditated, and the owner shall pay 3s. by which is meant that it shall be done *per visum proborum hominum*, as *carta de for.* 6. directs. Manw. 253, 254.

And it shall be done by an officer appointed by the court. Manw. 254.

Who with a mallet and chisel smites off at once the three claws of the dog's forefoot. Manw. 255, 256.

And after such presentment, (and not before,) process shall be awarded for such amerciament. Manw. 260.

And a person cannot disclaim the dog, without saying who is the owner. Manw. 262.

But an inhabitant within a forest may keep a mastiff being expeditated, for the safety of his house and goods. Manw. 243.

And if such mastiff be *inventus super feram*, &c. *ipse cujus est quietus erit de facto*. By the statute *de ass. et cons. foresta*, 6 Ed. 1. 9. Manw. 243.

So a little dog *unde nihil est periculi* may be kept, though he be not expeditated. Manw. 245.

So by a special grant of the king, a mastiff may be kept within a forest, though he be not expeditated. Manw. 246, 247.

So also a greyhound, and a spaniel, &c. Manw. 246.

So by *ch. de for.* 6. lawing of dogs shall not be done, but in places where it hath been accustomed since the coronation of H. 2.

And therefore a mastiff need not be expeditated within a chase. Manw. 257.

Nor within any place disafforested, after the disafforestation. Manw. 258.

[*]So if a man be found to have several dogs not expeditated, he shall be amerced only 3s. Manw. 263. 4.

So a man shall not be amerced, who is not the owner of the dog, though he took the dog by tort, or by bailment of B. who lives out of the forest, and keeps him in the forest; for B. shall be amerced for it. Manw. 263.

[*15]

(N) WASTE.

(N 1.) In cutting of vert, or covert.—What shall be vert.

By the st. 6 Ed. 1. Rast. Forest, 21. vert shall be reputed *omnis arbor fructum portans vel non, et antiqua fraxinus in foresta et arabili*.

And therefore, all wood and underwood within the forest is esteemed vert. Manw. 120.

Hault boys, which is called overt vert, comprehends all great wood. Manw. 121.

Ancient ashes, and holly trees. Ibid.

South (*pro soubis*) boys, which is called nether vert, comprehends all underwood. Ibid.

All bushes, thorns, gorse, &c. Ibid.

So all hault boys, or south (*pro soubis*) boys, within any demesne wood of the king is special vert. Manw. 124.

So in the demesne of a subject, all wood which bears fruit. Manw. 126.

If any cut the vert of the forest within his own land without licence, it will be waste. Manw. 147.

(N 2.) When cutting it is restrained.

By *ch. de for. regis Canuti*, 28. *bosco et subbosco nostro sine licentia primariorum forestæ nemo manum apponat*.

And if any offend in cutting of vert within the demesnes of the king, the cart and horses which carry it away are forfeited, and he shall be fined to the value of the wood cut. Manw. 124.

Per leges de for. regis Canuti, *siquis illicem aut arborem, quæ victum feris ruppeditat, sciderit, propter fractionem regalis chaceæ emendet regi 20s.* And by *charta de for.* 4. shall answer for waste, purpresture, and assart hereafter made.

Per ordin. de for. 6 Ed. 1. Rast. Forest, 21. *siquis extra dominicum infra regardam* (viz. out of the demesne of the king, and within the precinct in the forest,) *prosternit quercum, sine visu aut liberatione forestarii, aut viri dari debet attacharii per 4 plegios et per visum viridariorum quercus appreciari*.

And therefore, a man cannot cut wood in his own land within the forest, or destroy the coverts, without a view of the forester, and licence of the justices in eyre. Manw. 136.

If it be for fire, it may be cut by view of the foresters or verderors. Jon. 268.

And this is implied by the st. 1 Ed. 3. 2. which enacts, that any, having wood of his own in the forest, may take the same, without being attached by an officer of the forest, so as he do it by the view of the foresters.

Though it escheated to the king, and be then held by the king's patent; for the patentee shall be subject to the laws of the forest. Manw. 136.

[*]So he cannot give, or sell his wood within the forest to another, without a warrant from the king, or the justices in eyre. Manw. 137. And this *per ord. de for.* 6 Ed. 1. 6. Jon. 270.

Or make charcoal of the wood there. Manw. 138.

So he cannot cut for sale, without a writ of *ad quod dampnum*. Jon. 268.

So a licence by the justice in eyre ought to be *sedente curia*, or after a writ of *ad quod dampnum*. Jon. 209.

And if the officer gives a certificate, that the cutting was no prejudice, when it was a prejudice, he shall be fined. Jon. 274.

So *per ord. de for.* 6 Ed. 1. 6. *liberatio housebote et haybote fiat prout boscus pati potest*: and therefore he cannot take it without the delivery of the foresters. Manw. 137.

So he cannot make a woodward, without a prescription for it. Manw. 138.

(N 3.) When not.

But in a forest and chase in the hands of a common person, the owner of the soil may cut his wood, without the licence or view of the forester, if sufficient vert be left. R. Manw. 81 R. 12 Co. 22. 2 Cro. 155.

So in a free chase of the king. R. 12 Co. 22.

So by prescription, a man may cut timber in his own wood within the king's forest, without a view of the forester. Manw. 82. 135. in marg. 12 Co. 22, 23. Dub. Jon. 275. 6. R. cont. Jon. 290. Vide Prescription, (F 3.)

So he may take housebote, haybote by the view of the forester, without a licence of the justice in eyre. Manw. 137. 144.

So an officer of the forest may prescribe to have so much wood, to be assigned by the woodward within the forest, for his fuel. Semb. Sav. 5.

So upon request to the justice in eyre, an *ad quod dampnum* goes to inquire what damage the cutting will be, and the quantity and value of the wood, and upon the return of the writ to the chancery, or to the justice in eyre, he shall give a licence to the owner to cut, upon a recognizance to make fences for seven years. Manw. 140.

So the justice in Eyre, without an *ad quod dampnum*, may write by his warrant to the officers of the forest, and upon their certificate that it is no damage, grant a licence to the owner to cut his wood. Manw. 142.

Vide post, (N 8.)

(N 4.) What other privileges the owner shall have.

So by *ch. de for.* 9 H. 3. 13. every freeman shall have in his own wood ayryes of hawks, &c. and the honey there found.

By *ch. de for.* 9. every freeman may take agistment in his own woods in our forest, and his pawnage; and may drive his swine through our demesne woods to agist in his own or elsewhere, and shall not lose them if they tarry one night in the forest. Vide post, (O 1, &c.)

By *ch. de for.* 12. he may make his own wood, land, or water in the forest, mills, springs, pool, marle, pits, dikes or arable ground without inclosing it, so as it be not to the annoyance of his neighbours.

[*](N 5.) Privilege of the king in the wood or land of a stranger.

The king, or the owner of a forest, by his officers, may cut brouse wood for the deer in winter, within the wood of any, *infra regardum forestæ*. Manw. 138.

(N 6.) In his own wood, or land.

So the king, in his wood, or lands within his own forest, chase, or park, cannot, by commission of the treasurer, or the exchequer, sell any coppice

or wood, (except windfalls, roots, and dead trees,) without the licence of the justice in eyre. R. Manw. 145.

Nor can cut dead trees, or carry away windfalls, &c. except at the proper season, by the view of the officers of the game. Ibid.

And therefore, before sale of the king's wood, there shall be an *ad quod dampnum* to the warden, or justice in eyre, and returned by him. Manw. 146.

So before a warrant to cut for repairs, there must be a view and estimate of the *quantum*. Jon. 269.

So one may sell by the command of the king, without a regular licence for buying hay for the deer. Jon. 279.

So there shall be no sale of the king's wood by the justice in eyre, without a commission of the treasurer and exchequer. R. Manw. 143. 146.

Nor shall wood be cut by the justices in eyre, or other officers, for repair of lodges, pales, &c. (above two or three timber trees per annum in any forest, &c.) without allowance of the treasurer. Manw. 146. Jon. 279.

So the justice in eyre, or other officer of the forest, cannot claim dotards, windfalls, &c. as a fee by prescription; for it was part of the king's inheritance, and ought to be sold by commission for the king's profit. R. Manw. 144.

So a grantee or lessee of the herbage or pannage of a park, &c. can take only the surplus (if there be any) after the deer are supplied. Manw. 144.

But the king's farmer or copyholder may take timber according to the covenants of his lease, or the custom, by the view only of the forester. Ibid.

And the king may grant estovers in a forest, without the view of the forester. Manw. 144. in marg.

(N 7.) Inclosing of wood.

By the common law, the inclosure of all wood, cut by the owner within a forest, ought to be made only for three years, *cum parva fossa & bassa haia secundum assisam forestæ*. Manw. 82. 8 Co. 138. a. R. 2 Cro. 156. Jon. 278.

And if a deep ditch or high hedge be made, and continues for forty years, if it were not so before, it may be destroyed and pulled down. R. 2 Cro. 156.

[*](N 8.) Waste in the destruction of the vert.

If the cutting of vert or covert within a forest be waste, the destruction of it will be more strongly so; and therefore, if a man cut his wood within the forest by licence, &c. and afterwards do not inclose the wood with a sufficient fence, whereby it be destroyed by beasts, the destruction of the wood will be waste. Manw. 149.

So if he cut by licence, but at an unseasonable time, whereby the wood will never grow afterwards. Ibid.

(N 9.) In assarting of his land.

So it will be more heinous waste, if a man eradicate his wood, and convert his land to tillage, without licence; which waste is called assart from the word *essart*, which in French signifies to grub up. Manw. 155. 4 Inst. 306, 307.

So if a man convert his wood or land covered with broom, fern, heath, or other covert, to pasture and tillage, it will be an assart. Manw. 157.

So, if he convert meadow or pasture, within a forest surrounded with coverts, to arable, it will be an assart. Ibid.

So a grant to be quit of assarts, shall be only for those before committed. Jon. 271. 289.

(N 10.) How waste shall be punished.

If a man commit waste within a forest by cutting or destroying of the vert without licence, the wood or the land where the waste is done shall be seized into the hands of the king, till the owner replevy it, and make fine to the king. Manw. 151.

So if he assart any wood or land. Manw. 157.

Though the owner had an estate of inheritance in it.

Though he die before presentment of the waste; for the wood, or other land shall be seised, &c. till the heir replevy it, and make fine. Manw. 151. 158.

And if the owner or his heir will not pay his fine, the land remains in the king's hands for ever. Manw. 154. 158.

The fine shall be at the pleasure of the king, or the justice in eyre. Ibid.

But it is usually proportioned to the offence. Manw. 158.

And therefore, a presentment of waste in a forest ought to shew the nature of the waste, and by whom done, the quantity and value of the land, and where it lies. Manw. 152. 158.

So in lieu of a fine he may compound for an annual rent to the king, which ought to be entered upon the records of the forest. Manw. 160.

So over and above the fine, he shall pay the value of the corn growing. Jon. 269.

By the st. ord. de for. 6 Ed. 1. 4. *Siquis inventus fuerit in dominico regis assertando, &c. corpus debet protinus retineri; si extra dominicum infra rewardum, debet poni per 6 plegios; si alias, debet duplicare plegios; si tertio, corpus debet retineri.*

[*]And therefore, every one who is guilty of assart, and is found in the manner, if it be in the demesne of the king, shall be imprisoned till he pay his fine. Manw. 159. 163.

If it be in his own land, &c. (and not the king's) for the first and second offence, he shall find sureties, and for the third, he shall be imprisoned till the fine paid. Ibid.

If he be imprisoned, he shall be bailable only by the justice in eyre, or his deputy. Manw. 159.

But the land shall not be absolutely forfeited for waste within a forest. Manw.

So, a man shall not be taken by a warrant of the chief justice of the forest, unless he be indicted, or found in the manner. R. Carth. 78.

And if timber of the forest be found in his yard, this is not a finding in the manner. Per 3 Judg. Holt dub. Carth. 79.

(O) PRIVILEGE WITHIN A FOREST.

(O 1.) By agistment.

Agistment is, when a man agists, or drives beasts to depasture the herbage of a wood or land within the forest.

And by the st. ch. de for. 9. every one may agist his own beasts (except [*19])

sheep and goats) in his own wood or land within the forest, for a whole year at his pleasure. (Vide ante, N 4.)

If he has an estate in fee, or tail, for life or years, in his own right, or in right of another, he may do it by himself, or by his servant or agent. Manw. 193.

So, every inhabitant within a forest for hire may agist his commonable beasts in the demesnes of the king within the forest from fifteen days before Midsummer, to fifteen days before Michaelmas, viz. to Holyrood day, by assent of the verderors, foresters, and agistors. Manw. 180. 183.

And therefore, by *ch. de for. 8.* a swanimote shall be holden fifteen days before the feast of St. John the Baptist, when the agistors meet to fawn the deer. Manw. 183.

And there ought to be a commission from the justice in eyre to the agistors, &c. to make an agistment, upon which they return what they do. Manw. 185.

But a man cannot agist his own land with goats and sheep, though the words of *ch. de for. 9.* are general; for that would be to the banishment of the beasts of the forest. Manw. 193.

So, he cannot agist with the beasts of another.

If an inhabitant of the forest agists his beasts in the demesnes of the king *without licence*, he shall be fined. Manw. 188.

A foreigner, his beasts are forfeited. Ibid.

(O 2.) By pawnage.

So, by *ch. de for. 9.* every one shall have pawnage in his own land (viz. the mast of his trees, with swine) at his pleasure, except in land adjoining to the land or wood of the king. Manw. 190.

[*]And in his land or wood adjoining to the land or wood of the king, after the demesnes of the king are agisted. Manw. 191.

And he may agist with another's swine, after the king has agisted his demesnes.

So, every one, for hire, with assent of the verderors, foresters, and agistors, may have pawnage in the demesnes of the king from fifteen days before Michaelmas to forty days after, viz. from Holy-rood day to St. Martin's. Manw. 184.

But, *per ordin. de for. postquam dominicæ haie agistatæ sunt, licitum erit ei, qui boscum habet juxta dominicum boscum, tempore pannagii habere tot porcos quot per visum, &c. bosculus patipossit*, and not before. Manw. 191.

(O 3.) By common.—When allowed.

So every man, who has a right of common by prescription in the lands of the king, or another within a forest, shall have his common for all commonable beasts, notwithstanding the afforestation; for by *ch. de for. 1.* The afforestation shall be *salva communia de herbagio & aliis, illis qui prius habere consueverunt*. Manw. 217.

And therefore every inhabitant within a forest may prescribe for common within the forest for his commonable beasts levant and couchant upon his ancient tenement. Manw. 221. Jon. 283, 4.

So an inhabitant of a town may prescribe for common, for commonable beasts levant and couchant within the same town. Manw. 222.

So by special grant, a man may have common in a forest for beasts not commonable; as, for geese, goats, sheep, and hogs. Manw. 220.

So, he may prescribe for common there for sheep. Cont. Manw. 220. 222. Semb. acc. Manw. 227. Acc. 4 Inst. 298. R. acc. 3 Bul. 213. R. Lut. 81. R. 2 Cro. 155. Acc. Poll. 447. Dub. Hard. 87.

So, he may have common there *pour cause de voisinage*. Manw. 221. 224. So he may have common there in gross, by special grant. Ibid.

Common of turbary.

So, he may prescribe for common in a forest, generally, without exception of the fence month. Lut. 81. R. 3 Lev. 98. 127. Poll. 443.

(O 4.) When not.

But a man shall not have common in a forest, without charter or prescription, in respect of his inhabitancy there. Manw. 227.

So, if the inhabitants of a town may prescribe for common for commonable beasts levant and couchant in the same town, an inhabitant of a house newly built in the same town, being within the forest, shall not have common there; for such building is purpresture. Manw. 222.

So, regularly, a man cannot prescribe for common within a forest, for beasts not commonable; as, for geese, goats, or hogs. Manw. 220. 222.

Nor can he use common there with the beasts of a stranger. Manw. 223. Jon. 283.

Nor within a fence-month. Jon. 283.

So, a commoner ought not to surcharge the forest. Jon. 282.

Nor send his beasts with a staff-herd, who attends them. 2 Jon. 282.

[*]So, by the disafforestation of the land, the common will be lost. R. Hard. 438. Hale cont. if the land was not well put within the forest at first.

The right of common in the New Forest is absolutely taken away in the inclosed parts whilst inclosed, and continued in the waste parts, except in fence-month (fifteen days before, and fifteen days after 24 June) and winter-heyning (from 11 November to 23 April), and pannage is restrained to the time between 14 September and 11 November; and this though the whole 6000 acres is not inclosed. 2 B. 1117.

(P) THE LAWS OF THE FOREST.

The laws of the forest differ from the common law. Manw. 486.

By *ch. de for.* 9 H. 3. the laws of the forest are reduced to a certainty, which were before arbitrary at the will of the king. Manw. 487.

(Q) OFFICERS OF THE FOREST.

(Q 1.) Justice in eyre.

The chief officer of the forest is the justice in eyre. Vide Justices, (F)

So, all associated with him are called capital justices of the forest.

So, if the king grant a forest, without power to make a justice-seat, it will be only a chase. R. 2 Bul. 298. Vide ante (B).

And in a *quo warranto* to have a forest and justice-seat, if the defendant claim the forest, but disclaim to have the justice-seat, there shall be judgment against him. R. 2 Bul. 298.

(Q 2.) Verderor.

In every forest there are usually four verderors, so named, *a viridi*, or *vert*. 4 Inst. 317. Manw. 403.

The verderor is a judicial officer of the forest, chosen by force of the [*21]

king's writ in full county, and sworn to maintain the laws of the forest, and to view, receive, and inrol the attachments, and presentments of all trespasses within the forest, of *vert* and venison. 4 Inst. 292. Manw. 403.

And all the rolls ought to be in parchment, not in paper. Jon. 267.

And ought to be sealed before delivery ; but one seal with assent of all is sufficient. Jon. 268.

(Q 3.) Regarder.

The regarder or ranger is a ministerial officer of the forest, sworn to make regard there as usual, to view and inquire of all offences within the forest in *vert* or venison, and of concealments or defaults of the foresters, or other officers of the forest. Manw. 409.

And he shall be made by the king's patent, or by the chief justice in eyre, or upon a writ to the sheriff to make a regard of the forest, he shall be chosen in the county. Manw. 409. Jon. 266.

If the presentments by the regarders are insufficient, they shall be fined ; for by the articles sent to them with the writ of summons, they [*]are directed what ought to be presented, and in what manner. Jon. 268. 274, 5.

(Q 4.) Forester.

The forester is an officer sworn to preserve the *vert* and venison within his walk, to guard the *vert* and venison there, not to conceal but to attach all offenders, and to present the offences and attachments at the next court of attachments, or swanimote. Manw. 428.

And to ride with the king, and conduct him in his hunting. Jon. 278.

To take care of the lawing of the dogs. Jon. 288.

[The forester may arrest any man who kills or chases any deer within the forest, if he be taken with the manner within the forest, or be indicted before the swanimote, and may detain him till he find pledges to appear before the justice in eyre, but if he offer sufficient pledges he ought not to be imprisoned. 4 Inst. 290.

And if then imprisoned he may have a writ of *habeas corpus ex debito justitiæ* ; or he may be bailed by a writ *de homine replegiando*, directed *custodi forestæ*, he finding 12 pledges. 4 Inst. 290.]

(Q 5.) Woodward.

A subject, who has land within a forest, according to usage, ought to have a woodward, and if he does not appear at the justice-seat, the wood shall be seized into the king's hands, till he make fine and replevy it ; and if he do not replevy it within a year, it shall remain in the king's hands for ever. Jon. 266.

If wood, part of the king's demesne within a forest, be demised to another for years, the lessee shall find a woodward ; and if he does not appear, the wood and office shall be seized. Ibid.

And after seizure, no claim of the owner shall be heard till he replevy the wood. Jon. 267, 268.

(Q 6.) Agistor.

The agistor is an officer within the forest, who ought to present trespasses made by beasts in the forest. Jon. 280. [Vide Sir Edward Coke's description of an agistor, which differs something from this. 4 Inst. 293.]

If the same person has several offices in the forest, those may be seized *quæ intendere non possit.* Jon. 266.

So, if a town, &c. has a patent to be quit of service in a forest, it must serve till its claim be allowed by the justices in eyre. Jon. 267.

If any present what does not belong to his office he shall be fined. Jon. 280.

(R) THE COURTS OF THE FOREST.

(R 1.) The justice-seat.

The justice-seat is held before the chief justice or his deputy or deputies, whom he is empowered to make by st. 32 H. 8. c. 35. and who by that statute are vested with the same powers as the justice himself. Vide Justices, (F.)

[*][But this court cannot be held but from three years to three years, and must be summoned at least 40 days before its sitting, and two writs issue, one to the sheriff to summon all who ought to attend within his county; which see 4 Inst. 310. The other to the warden *custodi forestæ domini regis vel ejus locum tenenti in eadem.* Which latter consists of two parts: first, to summon all the officers of the forest, and that they bring with them all the records, &c. Secondly, all persons who claim any liberties or franchises within the forest, and to shew how they claim the same.

At the justice-seat, after the commission read, the officers of the forest, freeholders, and all who ought to appear, are demanded, and then a jury out of the freeholders is sworn, and a charge given to them. Manw. 509.

But the court may adjourn to another place in the county before demand, and may be demanded there. Jon. 347.

All offences, which concern *vert* or venison within the forest, are inquirable at the justice-seat, and not elsewhere out of the forest. Jon. 267.

And therefore, all rolls of offences presented at a court of attachment, or indicted at a court of swanimote under the seal of the verderors, ought to be presented at the justice-seat.

And the matter of fact contained in such rolls, whereof any one is convicted by the same rolls, cannot be traversed nor discharged, except by matter subsequent consistent with the fact, which may be pleaded thereto at the justice-seat; as a pardon, a release, &c. R. Jon. 347.

So, if the roll contain, that A. was indicted and convicted before the verderors at the swanimote of cutting trees within the forest, A. shall plead at the justice-seat, a grant of lands within the forest, upon which the trees grew. Jon. 347.

Otherwise, if the grant does not mention the trees to be within the forest. Ibid.

[But an indictment or presentment before the chief justice of the forest at a court of the justice-seat by a jury, and not found in the swanimote, may be traversed, 8 Edw. 3. Itinere Pickering 147. a. because it is presented but by one jury. 4 Inst. 129.]

So, the jury, charged at the justice-seat, ought to present all offences committed within the forest since the last justice-seat, and how they have been prosecuted, or punished by the officers of the forest. Manw. 509.

As, the cutting of trees, building of houses to the nuisance of the forest, &c. Jon. 348.

And the reeve, and four men of the towns ought to attend till presentment made. Jon. 297.

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So, the justice-seat may fine for contemptuous words. Jon. 274.

Or, for words at the swanimote before the justice-seat. Ibid.

After presentment, the party may confess and submit to be fined. Jon. 268.

And he ought plead presently, for the process is *de hora in horam*. Jon. 268.

If there be a claim at the justice-seat of any privilege or exemption, after the charter read, the court allows or disallows, without a demurrer, &c. by the attorney general. Jon. 272.

[*]Or, the party himself may disavow. Jon. 288.

So, if a claim be made and not prosecuted, it shall be disallowed. Jon. 297.

If the party prosecute his claim, he must make a good title to it. Jon. 294.

If a judgment at the justice-seat be erroneous, a writ of error lies in B. R.

So, if the justice-seat allows an unlawful claim, there may be redress, if the record be removed into B. R. by a *certiorari*, called a *venire facias recordum*. Manw. 526. 4 Inst. 294.

So, if it disallows a claim, which ought to be allowed, there shall be a writ *de libertatibus allocandis* directed to the justice of the forest.

(R 2.) The swanimote court.

The swanimote is derived from *mote*, which signifies a court, and *swaine*, which signifies a freeman; and therefore imports a court of freeholders within a forest. 4 Inst. Manw. 462.

In this court the verderors are the judges. Manw. 462.

And though the warden, or his deputy, or lieutenant, sometimes sit in court, yet they are not the judges there. Manw. 462, 463.

By the st. *ch. de for.* 8. the swanimote court shall be held only *ter in anno*, viz. fifteen days before, Michaelmas, about the feast of St. Martin in winter, and in the beginning of fifteen days before the feast of St. John the Baptist.

And all the officers of the forest, and freeholders within the forest, ought to appear there. Manw. 467.

If any one does not appear, his default shall be enrolled, and he shall be amerced upon the oath of the officers by the verderors and steward of the forest; and the amercement shall be assessed, and afterwards estreated by the verderors to the chief warden or his deputy, or to the beadle of the forest, to be levied by distress; or the verderors may certify the default to the justices of the forest, who shall make a writ to the warden or sheriff to levy it, or may estreat it in the exchequer, and process shall issue to levy it, Manw. 469.

The distress shall be for the amercement for his default, and also that he appear at the next swanimote. Manw. 470.

It may be upon his goods or lands within the forest, or lands out of the forest, which belonged to him as an officer of the forest. Manw. 471.

If it be returned by the chief warden or his lieutenant, that he has no lands or goods, whereby he may be distrained, there shall be a *testatum distringas* by the justices of the forest to the sheriff to distrain him within his county. Manw. 471.

CHATTELS.

GOODS AND CHATTELS. Vide BIENS, *per totum*.—CHANCERY, (4 W 5.)—

PROHIBITION, (F 5.)—TRESPASS, (A 1.—B 4.)

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CHATTELS REAL: Vide **BIENS**, (A 1.)—**CHANCERY**, (4 G 2, 3.)

———— **PERSONAL.** Vide **BIENS**, (A 2.)—**CHANCERY**, (4 G 1.)

[*]**CHESTER.**

COUNTY PALATINE OF CHESTER. Vide **FRANCHISES**, (D 4, &c.)

CHAMBERLAIN OF CHESTER. Vide **FRANCHISES**, (D 5.)

CHIEF JUSTICE OF CHESTER. Vide **FRANCHISES**, (D 6.)

CHIMIN.

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(A) HIGHWAY.

(A 1.) What shall be.

What shall be said to be a private way, and what a highway, depends upon common reputation. 1 Vent. 189. Vide post, (D 1, &c.)

A way to a market, a great road, &c. common to all passengers, is a highway. Per Hale, 1 Vent. 189.

A navigable river is in the nature of a highway. (d) { Vide Commonwealth v. Coombs, 2 Mass. Rep. 492. Arundel v. M'Culloch, 10 Mass. Rep. 70.

A bridge across a navigable river, may be removed by any person having occasion to pass the river. Arundel v. M'Culloch, *ubi supra*.

Vide also, Hooker v. Cummings, 20 Johns. Rep. 90. }

And if the water alters its course, the way alters. Per Thorp, 22 Ass. 93.

If a highway lies in an open field, and passengers use to turn out of the great track when it is foundrous, these outlets are part of the highway. R. 1 Rol. 390. l. 10. (e)

And if sown with grain, passengers may ride upon the corn. Ibid.

But if a man assigns a way, because the highway is foundrous, out of his own ground, that does not become the highway unless it be done by the king's licence upon an *ad quod damnum*. R. Cro. Car. 267. [Vide 1 Bur. 465.]

Though an inquisition upon an *ad quod damnum* finds, that it is no damage to the king to grant a licence; if the licence be not granted. R. Cro. Car. 267.

[A general way, and a private way by prescription, are inconsistent, and cannot be claimed together. Willes. 71.

Prescription for a right of way for A. and others, (not naming them), is uncertain, and bad even after verdict. Ibid.

A prescriptive right of way for coaches, &c. is good after verdict. Ibid.] (f)

(d) Common highway is a good description, without saying foot, horse, or cartway; it is a highway for all things. B. R. H. 315.

(e) Where a highway is overflowed or out of repair, passengers may justify on the adjoining land. Dougl. 746. 3 T. R. 263.

(f) 1. A *cui de sac*, with houses on either side, cannot be turned into a public thoroughfare, merely by removing the terminating line; at least not until the buildings, &c. are finished. 5 Taunt. 125.—2. Allowing the public to have a free unmolested passage for six years, has been held a sufficient ground to presume an intention to grant a right of way. 11 East, 375. n.

(A 2.) To whom the soil and profits belong.

The king has only passage in the highway for him and his subjects. 1 Rol. 392. l. 3. Bro. Chimin, 9, 10.

But the freehold and soil belong to the lord of the leet. 1 Rol. 392. l. 5. { Vide *Stiles v. Curtis*, 4 Day, 328. *Peck v. Smith*, 1 Conn. Rep. 103. *Perley v. Chandler*, 6 Mass. Rep. 454. *Fairfield v. Williams*, 4 Mass. Rep. 427. *Jackson v. Hathaway*, 15 Johns. Rep. 447. *Whitbeck v. Cook*, 15 Johns. Rep. 583. }

And he may have an action for digging the ground there. 1 Rol. 392. l. 8.

{ And so also, for any exclusive appropriation of the soil. *Cortelyou v. Van Brundt*, 2 Johns. Rep. 357. }

Yet the trees [and soil] in a highway generally belong to the proprietors of the soil, *ex. utraque parte*. R. 1 Rol. 392. l. 13. Bro. Chimin, 15. 1 Brownl. 42. [11 East, 51. Lofft. 358.]

But the lord of the leet may prescribe for the trees there.

[*] And by some it is said, that the trees belong to him. Per. Cur. 27 H. 6. 8. a.

So, the lord of a rape may prescribe for all the trees in the highway within his rape, though he be not lord of the manor. R. 1 Rol. 392. l. 15.

If a man be owner of a close by which a highway lies, the trees belong to him. Bro. Chimin, 9. (g)

[If a man sets out a highway, yet the property of the soil remains in him, and he may maintain trespass for resting the end of a bridge on it. Str. 1004.]

So he may recover it in ejectment, subject to easements; and he has a right to the freehold, and all profits above and under ground, except only to the right of passage. 1 Bur. 143. 147.]

(A 3.) How it shall be used.

If a carrier carries an unreasonable weight with an unusual number of horses, it will be a nuisance to the highway, by the common law. R. Mar. pl. 210,

So if a man erects a gate across a highway, it will be a nuisance.

Though it be not locked, but opens and shuts freely. Per 3 J. Cro. cont. Cro. Car. 184.

Or if he puts his wood-stack in the street before his house, according to the antient usage in the town, and leaves sufficient passage for travellers. R. 2 Cro. 446. (h)

(A 4.) How it shall be repaired.

If a highway wants repair, the parish of common right ought to repair it.

(g) 1. The presumption that the small portions of waste lying between inclosed lands and a highway belong to the owner of the adjacent inclosed lands, does not arise when the small portions of waste communicate with larger portions of waste, over which ownership is exercised by others. 7 Taunt. 39.—2. Without a special clause the soil of a public road is not vested in the road trustees, nominated by statute; but remains, as before the act, in the former proprietors. 1 East, 69.

(h) Where cattle, through default of the owner, escape into a highway, and thence into an adjoining close, the owner is liable as a trespasser of the proprietor of the close, because the right of the public is only to pass and repass, or drive their cattle along the road, and not to enter it for any other purpose. 2 H. B. 527.

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Mar. pl. 62. 1 Vent. 90. per Hale, 1 Vent. 183. 189. [2 Term. Rep. 106.] (i)

[*][If there is a road through common fields from A. to B. an act of parliament for inclosing, &c. and the commissioners direct that there shall be a road from A. to B. through the allotments of C. D. who incloses the road on both sides, he is not bound to repair, but the parish remains liable. 1 B. M. 461.]

And therefore an indictment against any persons of the parish, severally, shall be quashed. Mar. pl. 71. (k)

[If a parish is indicted, it must be laid, that the road is within the parish, or that it is obliged to repair. B. R. H. 105. Cowp. 111.]

The breadth of the road should appear, that the court may set a proper fine. Ibid.

The burthen of repairing may, from time out of mind, have been on separate districts of a parish for the several parts of a road lying within the respective districts. Vid. Doug. 421.

If a township is indicted for not repairing, it must be averred that time out of mind they have repaired. Andr. 276.

And in what manner they are bound to repair. 5 Bur. 2700. (l)

Common highway is a good description, without saying foot, horse, or cartway; it is a highway for all things. B. R. H. 315.

(i) 1. Unless they can shew that some other person is bound. 2 T. R. 106. 5 Burr. 2700.—2. And no agreement with any person can exonerate the parish from the obligation of repairing the highways within it; therefore, an indictment against an individual or a corporation, for not repairing a highway, which “by virtue of a certain agreement” they are bound to do, is bad. 3 East, 86.—3. Yet the inhabitants of a parish into which a road is turned by turnpike trustees, are not bound to do statute work thereon. 1 Blk. 603.—4. But though a particular township in a parish has been immemorially chargeable with repairing the parish highways, yet if new roads are created, the burthen of repairing them falls upon the parish at large. 2 T. R. 106.—5. And if an act of parliament, creating new roads within a parish, exempt one class of the parishioners, the inhabitants of a township, for example, from repairing them, the burthen of repairing remains with the rest. 2 T. R. 106.—6. Yet the circumstance that parties, road trustees for example, have repaired a road for a length of time, does not oblige them to continue the repairs. 2 T. R. 232.—7. The word “road,” includes the surface only, and not the fences on either side. Therefore, where trustees under a highway act are to repair the road, they are not obliged to maintain the fences. 2 T. R. 282.

(k) However if a parish lies in two distinct counties, an indictment for not repairing the highway, may be brought against that part of the parish in which the ruinous road lies. 4 Burr. 2507.—2. Yet generally the whole parish in which the road wanting repairs lies, must be indicted, and not a particular division within the parish; even though the parish is situate in two counties. 5 T. R. 498.—3. And those appointed by commissioners under an inclosure act, to repair a private road set out by them for the use of nine parishes, cannot be indicted for non-repair. 8 T. R. 634.

(l) 1. An indictment against a parish for not repairing a highway, merely states that they are bound to repair; the obligation being of common right. Whereas, one against a township in the parish, or an individual, shews the particular nature of the obligation. 2 T. R. 106. 513.—2. Formerly the use in pleading was to shew, that a highway led from one vill to another, that it might appear to be a public highway. Now it is settled to be sufficient in an indictment for a nuisance in, or for not repairing a highway, to state generally that it is such. 1 T. R. 570.—3. If a highway be described as leading from one place to another, both places are excluded. Therefore, an indictment against the parish of B. (on their common law liability,) for not repairing part of a road leading from A. to B., is bad; though it contain an averment that a certain part of the said highway situate in B. is in decay, since that is repugnant to what had been previously alleged. 3 T. R. 513.—4. If an individual, or a corporation are bound to repair certain precinct, except those, the repairs of which have been otherwise provided for, an indictment for non-repair must aver, that the road indicted is not one within the exception. 3 East, 86.—5. Indictments for not repairing highways, were formerly taken strictly, but of late greater latitude has been allowed. 4 Burr. 2091.

In an indictment against a person obliged to repair by tenure, *ratione tenuræ* is sufficient, without *sua*; for it implies such tenure as makes him chargeable. Str. 187.

By st. 13 G. 3. c. 78. s. 45. if the means pointed out by that act be not sufficient for the repair of the highways within the parish, township, or place within which such highways are, an equal assessment shall be made on the occupiers of lands, &c. within the parish, &c. by order of the justices.

And by s. 47. if any fine, issue, or penalty imposed on any parish, &c. be levied on any inhabitant, &c. of such parish, &c. on complaint of such inhabitant to the justices at their general or special sessions, [*]such justices shall, by warrant, &c. cause a rate to be made for reimbursing such complainant.

If a parish consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, the court will consider it as being substantially the conviction of the one district; and if the fine be levied on an inhabitant of the other, will grant a special *mandamus* for a rate to be levied on the district bound to repair the indicted part of the road. Doug. 421.

The presentment of the jury must say that the way is out of repair. B. R. H. 105.

If the indictment is for not paving, it is bad; they are not bound to pave, but to repair. Ibid.

The commissioners appointed by st. 6 Geo. 3. c. 78. (an act for dividing and enclosing certain lands in the parish of C.) which enacts that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by such person or persons as they should award, have no power of imposing on the parish at large the burden of repairing any of the private roads set out in pursuance of the act. 6 T. R. 20.]

And an agreement with another, that he shall repair, does not exempt the parish. 1 Vent. 90. 189. [3 East, 86.]

So the king's grant does not exempt the parishioners. R. 3 Mod. 96.

But a man may be bound by tenure to the repair of an highway. 2 Sand. 161.

And the lien continues, though he lays his land open to the highway. Per Keeling, 2 Sand. 161.

[By stat. 13 G. 3. c. 78. s. 23. surveyor shall inform two justices, on oath, what roads are to be repaired by tenure, &c. and they shall limit a time for repairing them; if not done, they shall present it at quarter sessions, who may order prosecution at the general expence of the limit.

By stat. 13 G. 3. c. 84. s. 62. turnpike trustees may agree with persons liable by tenure to repair, and make them reasonable allowance out of tolls. Vide 2 East, 413.]

So, by prescription he may be bound to repair before his house. Mar. pl. 71.

So, if a man incloses his land in a common field, *ex utraque parte* of a highway, he shall be bound to the repair by reason of the encroachment, though he was not liable before. R. Cro. Car. 366. 1 Rol. 390. l. 30. Jon. 296.

And he ought to make a good way, and maintain it for all carriages as well as horses, at his own charges; and it is not sufficient that it is better than it was before. R. Cro. Car. 366.

So, if a man incloses against one side of the way only, where there was an

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ancient inclosure against the other, he ought to repair the whole. Per Keeling, 1 Sid. 464.

But if a man incloses only one side, where there was no inclosure on the other, he shall be bound to maintain only a moiety of the way. 1 Sid. 464.

[*] And if a man, bound by reason of inclosure, lays his land open again, he shall be excused. Per Keeling, 2 Sand. 160.

The occupier is bound to the repair of the highway, not the owner. R. 1 Rol. 390. l. 50.

[B. R. will grant information against inhabitants for not repairing. B. R. H. 159.]

[So if they have repaired only with faggots covered with earth, when they might have had stone two miles off. Ibid.](m)

(m) 1. Where a parish indicted for non-repair of a highway within it, throws the burthen of repairing on certain of its townships, part on one, part on another, the plea must specify what particular portion is repairable by each. 11 East, 304.—2. A presentment of a highway being out of repair, by a justice of peace upon his own view, is traversable generally. 3 Burr. 1530. 1 Blk. 467.—3. A presentment against a parish for not repairing a highway, must allege that it is within the parish. Cowp. 111.—4. In order to be discharged from an indictment for not repairing a highway, the parties must produce an affidavit, that the road is now actually repaired since the conviction, and is likely to continue so. 3 Smith, 575.—5. If a parish consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other having notice of the indictment, the court will consider it as being substantially the conviction of the district which ought to have repaired; and if the fine has been levied on an inhabitant of the other, will grant a special *mandamus* for a rate on the district bound to repair. Dougl. 421.—6. The construction of s. 33. of stat. 13 Geo. 3. c. 84. is that the court which imposes the fine, on conviction, for the non-repair of a road, have power to apportion it between the parish and the road trustees. 2 East, 413.—7. A person indicted for not repairing a road *ratione tenuræ*, shall pay costs to the prosecutor. 1 Blk. 602.—8. Where a road has been presented under 13 Geo. 3. c. 78. s. 24. by a justice of the peace, the justice is looked to as the prosecutor through all the subsequent stages; though any steps taken by another with his consent, being under his direction, and therefore as his own, are valid; such as a removal of the presentment by *certiorari*. 2 T. R. 261.—9. Though any one may indict a road out of repair, yet it is peculiarly the duty of a magistrate to see that it is in repair, so that if he indicts it, he is discharging his duty, and entitled to costs under stat. 5 & 6 W. & M. c. 11. s. 3. on a conviction, after a removal by *certiorari*. 5 T. R. 33.—10. The stat. 13 Geo. 3. c. 78. s. 65. enables "the court before whom any indictment for not repairing highways is tried, to award costs to the person indicted, to be paid by the prosecutor, if it appear to the said court that such prosecution was vexatious." An application for costs under this stat. can only be made to the judge at *nisi prius*, not the court in bank. 5 T. R. 272.—11. The prosecutor of an indictment for stopping up a road, who has since been obliged to go round about, is entitled to costs as a party grieved within the stat. 5 W. & M. c. 11. s. 3. 7 T. R. 32.—12. Rule obtained on affidavit by several persons, inhabitants of a parish, to shew cause why a presentment against the inhabitants should not be discharged, &c. This rule being discharged with costs, an attachment was charged against these persons for non-payment of costs of the rule, and not against the inhabitants. 1 Smith, 168.—13. That the prosecutor of an indictment for obstructing a highway, may be entitled to costs under stat. 5 & 6 W. & M. c. 11. s. 3. he must have been a party aggrieved by the obstruction, beyond what the public in general suffer. 1 M. & S. 268.—14. Semble, that a party paying the expence of indicting a highway, must be presumed to be the prosecutor, though his name is not indorsed on the indictment. 1 M. & S. 263.—15. The stat. 5 W. & M. c. 11. s. 3. giving costs to prosecutors, in certain cases, is to be construed not strictly, but as a remedial law, it being beneficial to the public that prosecutors should be encouraged, when acting from laudable motives. 3 M. & S. 465.—16. A *certiorari pro rege* lies on 13 Geo. 3. c. 78. s. 24. relative to highways, before traverse of the indictment or judgment thereon. Cowp. 78.—17. The stat. 22 Car. 2. c. 12. s. 4. prohibits the removal of indictments for not repairing highways before traverse and judgment given thereon. The statute 5 W. & M. c. 11. s. 6. relaxes that prohibition in those cases in which the right or title to repair may come in question. A parish is indicted for non-repair of a highway; they plead not guilty. Now since upon this issue the course to be pursued is to determine whether this highway be public, and as one and the first step to determine that point is to ascertain who are bound to repair it, the title to repair comes

[*](B 1.) BRIDGES IN A HIGHWAY.

None can be compelled to make a bridge in an highway, where there was not one before, unless by act of parliament. 2 Inst. 701.

By the st. *magna charta*, 9 H. 3. 15. *nulla villa nec liber homo distringatur facere pontes, nisi qui de jure facere consuevit temp.* H. 2.

So no one can erect a public bridge without licence, and an *ad quod damnum*. 1 Sal. 12.

So a county cannot change a bridge from one place to another, without an act of parliament. R. Mod. Ca. 307. (n)

(B 2.) How repaired.—By whom.

By the common law no one was bound to the repair of a bridge, but by tenure or prescription. 2 Inst. 700.

And if no one was bound by tenure or prescription, it should be repaired by the whole county. 2 Inst. 701. 1 Rol. 368. l. 10. Cro. Car. 365.

Or if it lies in a franchise, by the whole franchise. 2 Inst. 701.

Or if part in one county or franchise, and part in another, each ought to repair as much as lies in it. 2 Inst. 701. And this is now confirmed by st. 22 H. 8. 5.

Though the sessions charge only one vill for the whole. R. 1 Sal. 359.

But the terre-tenants on each side of a highway are not bound to repair a bridge in it. 2 Inst. 700.

[*]So if a man erects a public bridge, he is not bound to repair it. 2 Inst. 701. 1 Sal. 359.

Nor if he voluntarily repairs it once or twice; for that is only evidence

into question upon such an issue, and the indictment, therefore, may be removed before traverse and judgment given thereon. 3 M. & S. 465.—18. The words “such writ of *certiorari*,” in the third section of the stat. 5 W. & M. c. 11. are not confined to such cases of *certiorari* as are mentioned in the preceding section; but, as the words in the second section are general; the whole act one entire act passed at one and the same time; therefore, “such *certiorari*” may mean “any *certiorari*,” 3 M. & S. 465.—19. The notice of appeal against a distress for non-payment of a highway rate, need not disclose the grounds of objection. 1 M. & S. 411.—20. The six days limited for notice of appeal against a distress, for non-payment of a highway rate, are reckoned from distress made. 1 M. & S. 411.

(n) 1. The question whether a bridge is a public one, must be decided without reference to its class or description. 13 East, 95.—2. A bridge of public utility, built by an individual, dedicated to and accepted by the community, is a public bridge. 2 East, 342. 345. Id. 356. 12 East, 192.—3. If a bridge, built by an individual and dedicated to the community, is not what it seems to be, but is of imperfect and inartificial construction, the public may reject and indict it for a nuisance, after discovering the cheat, though their previous conduct might, under different circumstances, have amounted to an acceptance. 2 East, 342.—4. Where an individual unnecessarily builds a bridge in a highway, the public do not adopt it as their own by using it in their passage along the road, for they cannot avoid it. 13 East, 220. 14 East, 317. 3 M. & S. 526.—5. If an individual throws a bridge over a ford, the passage through which is inconvenient at particular seasons, the building is of common utility, and the public, if they mean to reject it, must indict it as a nuisance; if they do not, they accept it by passing over it. 2 M. & S. 513.—6. Three hundred feet of the road on the one side, and the same distance on the other next adjoining the ends of a public bridge, are reckoned parcel of it; so that the county bound to repair the bridge, must likewise repair those portions of the road. 7 East, 588. 3 Smith, 467. 5 Taunt. 284. 2 Dow, 1.—7. Though there cannot be a partial dedication to the public of a bridge or highway, still the dedication may be limited in point of time. Thus, a bridge may be a bridge dedicated to the public; a public bridge, over which the builder allows them to pass only at seasons when the ford besides it is dangerous, and keeps a bar across at all other times. 2 M. & S. 262.

[*31] [*32]

against him of a lien by prescription, if he cannot shew who ought to repair. 2 Inst. 700.

So an usage by the ancestor does not bind the heir to repair, without a lien and assets. Ibid.

Yet a corporation sole or aggregate may be bound to repair by usage and prescription, without more. 2 Inst. 700.

And if a man bound by tenure, sells part of the land to one, and part to another, each may be charged for the whole. Jon. 273. R. 1 Sal. 358.

Though the land bound comes afterwards to the king. R. 1 Sal. 358.

But he shall have a writ *de onerando pro rata portione* against the other. 2 Inst. 700. Hard. 131. Dan. 744.

So if an owner of a mill make a channel to it across the highway, and a bridge there, which is used as a public bridge, he shall be bound to the repair. R. 1 Rol. 368. l. 15. Semb. Cro. Car. 365.

Yet a private bridge, which comes to the public benefit and use, shall be repaired by the public. 6 Mod. 307. E. 10 Geo. 3. 5 Burr. 2594. 2 Bl. 685. S. C. 28 Geo. 3. 2 East, 353, n. 42 Geo. 3. 2 East, 342. (o)

(B 3.) Remedy for not repairing.—By the common law.

If a bridge wants repair by the common law, the remedy was by presentment before B. R. or justices in eyre. 2 Inst. 701.

Or before commissioners of oyer and terminer. Ibid.

Or before the sheriff in his tourn, or in the leet. Ibid.

Or before the sheriff by commission; but this is now taken away by st. 28 Ed. 3. 9. 2 Inst. 701. F. N. B. 127. E.

[The sessions impose a general rate, and order the officers to make a particular assessment and collect it. Andr. 101.]

[It is not necessary that the order for the assessment of the repair of a county bridge should set forth that it is presented by whom the bridge should be repaired; for the only matter necessary to be presented is, that it is a public bridge, and out of repair. Andr. 101. 285.]

[*] Or there may be an information exhibited for not repairing. 2 Lev. 112. (o)

If it is a private bridge to a mill, &c. he that has the passage may have a

(o) 1. If a bridge, built by a county, be of utility to it, the county must repair; if by a private person for his own benefit, he must repair. 5 Burr. 2594. 2 Blk. 685.—2. Yet the county are bound to repair a bridge of public utility, which having been built by individuals, and dedicated to the community, has been accepted by them. 2 East, 342. 353. n. 356. n. 12 East, 192.—3. So a bridge built by trustees under a turnpike act in which there is no provision made for exonerating them. 2 East, 342.—4. And if a public foot-bridge, the repairs of which individuals are chargeable, is enlarged to a carriage bridge, and used as such by the community, the county are liable to repair *pro rata*. 2 East, 353. n. Vide 6 T. R. 194. 3 B. & P. 354.—5. And if a second bridge is thrown over any part of the three hundred feet, and adopted by the public, the inhabitants of the county in which the new bridge lies, must repair it. 14 East, 477.—6. Yet if a bridge is thrown over a highway, and the public in their transit derive no advantage from the bridge greater than what they possessed before it was built, the builder is bound to repair it. 3 M. & S. 526.—7. So where a company empowered to make a river navigable, and to alter such highways as might hinder the navigation, leaving others as convenient in their room, destroyed a public ford, substituting a bridge for it, they were held liable to repair. 13 East, 220. 14 East, 317.—8. So if a company of individuals are empowered by act of parliament to carry a canal through a public road, they are bound to throw a bridge across the cut, and repair it. 3 M. & S. 526. (e) Information in B. R. lies, notwithstanding the st. 22 H. 8. 5, and 1 Ann. 18. Str. 177. [*33]

writ *de ponte reparando* against him who ought to repair it. F. N. B. 127. D. 2 Inst. 701. (p)

To an information or indictment for not repairing, if the defendant pleads not guilty, he shall give nothing in evidence, but that the bridge is repaired. Per Holt.

If he pleads, that another ought to repair, he ought to shew for what cause ; viz, *ratione tenuræ*, by prescription, &c. Cro. Car. 366.

And if he alleges, that it is a new bridge erected for the benefit of a mill, it is not sufficient to take by protestation that it is not an ancient bridge ; for that is the substance, and ought to be directly answered. R. Cro. Car. 365. (q)

If the defendant alleges, that A. ought to repair, &c. *absque hoc* that the county ought, the attorney-general may reply, that the county ought, *absque hoc* that A. ought, and tender issue upon it. 2 Lev. 112. (r)

(B 4.) By statute law.

By the st. 22 H. 8. 5. confirmed by the st. 1 Ann, 18. justices of peace of a county, franchise, &c. or four of them (one quorum) shall have power at quarter-sessions to hear and determine all annoyances of bridges broken in highways.

And to make such process and pains, on presentment before them, against those, who ought to be charged with making or amending such bridges, as B. R. uses to do, or as they shall deem necessary.

And if not known who should repair, &c. the bridge, or such part as lies in a town corporate, shall be repaired by the town ; if out of [*]the corporation, by the county ; and four justices of peace (one quorum) may summon the constables, or two inhabitants of every parish, and tax all the inhabitants for the repair, &c. and deliver a roll of the names and sums to the collectors of each hundred, who may levy by distress and sale, &c.

And four justices of peace (one quorum) may appoint two surveyors to see the repairs, to whom the collectors shall pay the money, and they shall all account to the justices of the peace, or four (one quorum) at the sessions,

(p) An indictment against an individual for not repairing a bridge, laying the charge (not *ratione tenuræ*, but) by reason of ownership, is bad on error. 1 M. & S. 435.

(q) 1. The inhabitants of a county, if indicted for the non-repair of a bridge, or of the highway within three hundred feet of the extremity of the bridge, must, to exonerate themselves, plead specially that some other is bound, by prescription or tenure, to repair the same. 7 East, 588. 3 Smith, 467. 5 Taunt 284. 2 Dow. 1.—2. Indictment against the county for not repairing a public bridge. Plea, not guilty. Evidence that an individual had been in the habit of repairing the bridge, tendered. Objected, the only question upon these pleadings is, whether the bridge is out of repair, and not who is bound to repair it. Had the county meant to throw the burthen upon the individual, they should have pleaded specially. Held, that upon this issue, the prosecutor was bound to prove the bridge a public bridge, and that the evidence tendered was admissible, not to throw the onus of repair upon others, but to shew that the bridge was not public. 2 M. & S. 262.

(r) 1. A plea by the county indicted for the non-repair of a bridge described as a carriage bridge, that certain persons have been immemorially chargeable to the repairs thereof, is not supported by proof that the bridge was an ancient foot bridge, with the repairs of which those persons had been charged immemorially, but that it has lately been enlarged to a carriage bridge. 2 East, 353.—2. If a land-owner charged *ratione tenuræ* with repairing a bridge alien parcel, and afterwards continue the repairs alone, the presumptions are that the part retained was alone charged with repairing. 16 East, 223.—3. The prohibition in st. 1 Ann, c. 18. s. 5. against the removal by *certiorari* of indictments and presentments for not repairing county bridges and highways out of the county, only applies to the defendants, not the prosecutor. 6 T. R. 194. 3 B. & P. 354.—4. If a bridge that is not of public utility is built in a highway, it may be indicted as a nuisance. 2 East, 342.

and on refusal be committed without bail till they do so, allowing reasonable charges.

And if the person, who ought to repair, &c. dwell in another county, the justices of peace may send the same process, as if in the same county, which all sheriffs, &c. shall execute.

And four justices of peace (one quorum) may use the same methods for repair of 300 feet at each end of bridges when out of repair, as for repair of the bridges.

By the st. 1 Ann. 18. justices at the quarter-sessions shall lay such sum on each parish as it hath usually been assessed at, which shall be levied by the constable or other persons as the justices shall direct, and by them in six days paid to the high constables, and by them in ten days to the treasurer, for repair of the bridges.

Such assessment to be levied by distress and sale, on non-payment in ten days after demand.

By the st. 22 H. 8. 5. justices of peace have no authority, except of public bridges, not of private. 2 Inst. 701.

Justices of peace of the county have no cognizance of the repair of bridges within a franchise, borough, or city, if there are four justices there (one quorum). 2 Inst. 702.

But if there are not so many justices of peace in the franchise, then the justices of the county shall inquire of the bridges there, if the franchise be not a county by itself. Ibid.

And if it be a county by itself, then no remedy but by common law. Ibid.

Justices of peace shall have jurisdiction of a common bridge in a common street, as a nuisance, though it be not in a highway. 1 Sal. 359.

If it be known who ought to repair any bridge, by the st. 22 H. 8. 5. the justices of peace shall issue the same process as the justices of B. R. 2 Inst. 702.

And so, for rebuilding, if necessary, as well as repairing. Ibid.

If it be not known who ought to repair, it is well, for the security of the justices of peace, that the grand inquest present the bridge in decay, &c, *et quod necitur qui*, &c. 2 Inst. 703.

If it be not known who ought to repair, it shall be at the charge of the county, &c. 1 Rol. 368. l. 10. Vide ante, (B 2.)

And this act of 22 H. 8. 5. ought to be executed by four justices (one quorum) or more. 2 Inst. 703.

And it is good to do it by more, otherwise if one dies, or is put out of the commission, the three others have no other authority to proceed. 2 Inst. 703.

It is safe, that all proceedings of the justices of peace upon this statute be at the general sessions of the peace. 2 Inst. 705.

[*]The justices of peace cannot tax, without assent of the constables or inhabitants. 2 Inst. 704.

And therefore, they ought at the general sessions, where the constables are present, to call them, or by warrant summon them, or two inhabitants, at a certain place and time for that purpose. 2 Inst. 703. in marg.

The tax shall not be imposed upon the parish in general, for then any inhabitants might be distrained for the whole, but upon each inhabitant by himself. 2 Inst. 704.

And here all privileges and exemptions, though by parliament, are taken away. Ibid.

Every householder is an inhabitant, but not a servant, &c. though he has a personal residence. 2 Inst. 703.

Every one who has a house and servants there, though he resides in another county. Ibid. •

So a man dwelling in another county, who occupies land there. 2 Inst. 702.

So a corporation, which occupies land in another county, is an inhabitant there. 2 Inst. 703.

So an infant, who has an house, or holds land there. Ibid.

So a man, who holds land there in right of his wife. Ibid.

The collector of every hundred shall have a roll indented, under the seal of four justices of peace. 2 Inst. 704.

The collector may distrain for the tax, upon the land or goods of the party, at any place within the hundred. 2 Inst. 705.

If the tax be not paid upon demand, it is a refusal, though it was not expressly denied. Ibid.

One of the collectors, with the assent of the other, may distrain and sell; for that is the distress of both. Ibid.

The surplusage upon a sale shall be returned to the owner. Ibid.

None can be compelled to make a new bridge, where there was not any before, except by act of parliament. 2 Inst. 701.

By 12 G. 2. c. 29. s. 13. no part of the county rate shall be applied to repair bridges, but on presentment of the grand jury. •

And by s. 14. the quarter sessions may contract for their repairs for seven years, at an annual sum.

By stat. 14 G. 2. c. 33. quarter sessions may purchase lands to build county bridges, not exceeding one acre for each bridge. (s)

[*](C) SURVEYORS FOR THE HIGHWAY.

(C 1.) How chosen.

By the st. 2 & 3 Ph. & M. 8. on Tuesday or Wednesday in Easter week, and by the st. 22 Car. 2. 12. on some day in Christmas week, and by the st. 3 & 4 (or 3) W. & M. 12. on 26th December, unless it be Sunday, and then the 27th, the constables, churchwardens, &c. shall chuse two surveyors for a year to amend the highways leading to market towns, who refusing shall pay 20s. a-piece.

By the st. 3 & 4 (or 3) W. & M. 12. the parish shall assemble and make a list of such inhabitants, who have 10l. per annum in their own or their wife's right, 100l. personal estate, or farm 30l. per annum, or if no such, of

(s) 1. The same powers of procuring materials and removing nuisances are given to the surveyors of bridges, as are vested in the surveyors of highways by the 13 G. 3. c. 79. ; and all the powers and provisions of said act are extended to bridges, for the purposes of their amendment or alteration. 43 G. 3. c. 59.—2. The powers of the 43 G. 3. c. 59. contained for the purchase of any land or ground for the purposes of said act, are extended to such building or erections as may be necessary to be purchased, 54 G. 3. c. 90.—3. And the provisions of said act are also extended to bridges, &c. repaired by hundreds or other divisions of counties. Ibid.—4. And these acts are amended by 55 G. 3. c. 143. which empowers the surveyors of county bridges, &c. with the consent of two justices of peace, to take stones from any quarry in such counties (except from quarries situated in gardens, &c.) making compensation for damages, &c.—5. And this act also enables justices of peace to contract for the repair of county bridges, &c.—6. Quarter sessions may appoint justices to superintend occasional repairs, 52 G. 3. c. 110.—7. Justices at sessions may contract for keeping in repair roads over bridges. Ibid.

the most sufficient, and return the list to the justices of peace at special sessions, 3d January, or, if Sunday, the 4th, or in fifteen days after, of which ten days notice shall be given to the parish; and the justices shall by warrant under hand and seal appoint one, two, or more out of such list to be surveyors for next year; which nomination shall in six days be notified to the persons chosen, by the constable or surveyor, by leaving the warrant or a copy at their place of abode. And if any refuse the office, they shall forfeit 5*l.* each, a moiety to the informer, a moiety to the repair of the highway, to be levied, on the oath of one witness, by warrant of two justices of peace by distress and sale, &c. And then the justices shall nominate another fit person, who on notice, &c. refusing, forfeits 5*l.* &c. And the constables, churchwardens, and surveyors not returning a list forfeit 20*s.* each, to be levied, &c.

By stat. 13 G. 3. c. 78. on 22d September the constables and householders assessed to public rates shall name ten inhabitants, who have each 10*l.* a year lands, or 100*l.* personal, or occupy lands of 30*l.* a year; or for want of such, the most sufficient inhabitants; and in three days the constable shall transmit a copy to a justice near the place, and shall deliver the original to the special sessions for the highways, next after Michaelmas quarter session, and shall in three days give personal notice, or leave notice in writing to the persons named. Justices to give ten days notice of their special sessions, and to name what surveyors they think fit from the lists, if they think them qualified; if not, from other substantial inhabitants or occupiers of lands living within three miles of the place, in the county. Constables to give persons appointed notice, by serving the warrant in three days. If he accepts, he is surveyor for the year ensuing. Justices to give them a charge. Person named in the list, not accepting, if appointed, in six days, forfeits 5*l.* Person not in the list, but appointed, not accepting, forfeits 50*s.* No person serving can be again appointed (without consent) in three years from such appointment and service.

If no list returned, or if the person appointed refuse, the justices shall at that or a subsequent sessions, in a month, appoint another person to be surveyor, with salary out of forfeitures, not exceeding one eighth of a six-penny assessment.

If constable does not make list and return it and the duplicate, and give the notices, and serve the warrants, and return the amount of the assessment, if required, he forfeits 40*s.* for every default.

[*]S. 2. If surveyor with salary is appointed, a substantial inhabitant shall be appointed his assistant; if he refuses to accept, he forfeits 50*s.*; and so another, under like forfeiture; and then a third, who shall have those two forfeitures, and further salary, if necessary. Assistant serving, cannot be appointed assistant in three years from his first appointment, without consent.

S. 3. surveyor with salary, not residing in the place, shall give bond to account; and so by st. 13 G. 3. c. 84. s. 65. shall treasurer and surveyor of turnpike.

S. 4. assistant is to assist in calling in and attending the statute-duty, in collecting compositions, &c. and assessments, making and serving notices, to account for money received to surveyor, or in default forfeits double value; and for every wilful neglect of duty, forfeits from 5*l.* to 40*s.* shall pay sums above 40*s.* on surveyor's order in writing. Surveyor not responsible for money not received by him, or paid by his order.

S. 5. two-thirds of the parish-meeting may agree with a person of skill

to be surveyor, with a salary, and return his name, with the list, to the justices: who may, if they think proper, appoint him, and allow him the salary agreed on, to be raised as the former.

If surveyor dies, or becomes incapable, the justices may appoint another, and allow him the salary.

S. 55. justices of corporations shall not allow salary to surveyor appointed by them, unless approved by two-thirds of town-meeting.

S. 71. justices shall give every surveyor appointed an abstract of this act, and the clerk to have 6*d.* for it.

S. 86, 87, 88. this act extends not to Bristol, Whitechapel, or Wapping, nor to the commissioners of sewers.

The magistrates are not bound to appoint surveyors from the list of persons returned to them under this statute, if in their opinion the persons are not qualified; but they may appoint other persons of the parish who are qualified. H. 37 Geo. 3. 7 T. R. 169.

By stat. 13 G. 3. c. 84. s. 44. turnpike trustees shall swear themselves worth 40*l.* per annum in lands, &c. or 800*l.* personalestate, or heir apparent to a person worth 80*l.* per annum, or forfeit 50*l.*

S. 46. keeper of public house shall not be a trustee or officer of turnpike; but he may farm the toll, if he employs a collector not incapacitated.

S. 49, 50. if a sufficient number of trustees do not appear at any meeting, the clerk may fix and give ten days notice of another. And no meeting shall be adjourned for more than three months; no business done before ten in the morning, nor adjournment made to any hour after two in the afternoon. (1)

[*](C 2.) Their authority and power.—To provide labourers.

By the st. 2 & 3 Ph. & M. 8. every person for every plowland in pasture or tillage he occupies in the same parish, and every one keeping a draught, or plough, shall send a cart with horses, &c. and all necessaries, and two able men with the same, at every day and place appointed for amendment of the highways, on pain of 10*s.* for every draught: and every other householder, and every cottager or labourer shall (unless he be a yearly hired servant) by himself or sufficient labourer, work every day, &c. on pain of 12*d.* per diem; but if a carriage is thought needless by the surveyor, every person shall send two labourers each day for every carriage, on pain of 12*d.* per man. And the leet, or in default, the justices of peace at the quarter sessions may fine all offences, and the clerk of the peace, &c. shall make estreats, indented of the fines, and deliver one part to the constable and churchwardens of the parish, the other to the high constable, &c. who may levy by distress, and if no distress, or he pay not in twenty days, he shall pay double. And the high constable shall yearly account to the constable and churchwardens of the parish on pain of 40*s.* and the constable and churchwardens may call him, or their predecessor, to account before two justices of peace (one quorum), who may commit, till all ar-

(1) 1. Magistrates are not bound to choose surveyors of the highway from the list, returned under st. 13 Geo. 3. c. 78. s. 1. 7 T. R. 169.—2. And no appeal lies to the quarter sessions, against allowance of the accounts of the surveyors of the highways under st. 13 Geo. 3. c. 78. 5 T. R. 629. Id. 701.—3. Road surveyors are only protected by the provisions of the highway act, when acting *bona fide*. 13 East, 200.—4. And the sufficiency of amends paid into court, under the highway act, by road surveyors, in an action brought against them, cannot be questioned. 13 East, 200.

rears paid, but shall allow 8*d.* per pound for the collection, and 12*d.* per pound to the clerk of the peace, or steward of the leet, and all fines shall go to the repair of the highway.

By the st. 18 El. 10. a person (not in London) rated to the subsidy 5*l.* in goods, or 40*s.* in lands, shall find two labourers in the highway while so rated, if not otherwise chargeable by any former law, but as a cottager.

And a person, having a plowland of tillage or pasture in several parishes, shall find a cart, &c. in the parish where he dwells, as if all in the same parish; but if several plowlands in several parishes, he shall find for each, as if in the parish where he dwells.

By the st. 22 Car. 2. 12. where the usage is to carry gravel, &c. on horses, &c. the inhabitants shall send in such horses, &c. instead of teams; and for default of working in the highway, every labourer shall forfeit 18*d.*, every horse and man 3*s.*, every cart and two men 10*s.* for every day, for repair of the highway, to be levied, on proof before the next justices of peace by one witness, by distress and sale, &c.

But they may also be indicted, for this was an indictable offence before this statute. Vid. 2 Bur. 832. 834.

By the st. 7 & 8 W. 3. 29. a person having 50*l.* per annum in woodland, or any other land, shall be deemed to have a plowland within the said acts.

The justices of peace, &c. ought to appoint particular days for working in the highway; for it is not sufficient to say, six days between such a time and such a time. R. 1 Sal. 357.

So, an indictment for not working ought to shew the particular days appointed. Ibid.

[*]But if particular days are not appointed for working in the highway, a parishioner is not bound to work there. Ibid. (u)

(u) The 13 Geo. 3. c. 78. contained several provisions (s. 34 to 52.) in respect to the statute duty or proportion in which the inhabitants and occupiers of lands, &c. within the respective parishes, &c. should be chargeable to repairs; but this act was amended in these respects by the 34 Geo. 3. c. 74. which enacts that the surveyor, together with the inhabitants and occupiers of lands, &c. within each parish, township or place, shall, at proper seasons in every year, use their endeavours for the repair of the highways, and shall be chargeable thereunto as follows, viz. every person keeping a waggon, cart, wain, plough, or tumbrel, and three or more beasts of draught used to draw the same, shall six days in every year (if so many shall be found necessary) to be computed from Michaelmas to Michaelmas, send on every day, and at every place, to be appointed by the surveyor for amending the highways in such parish, &c. one wain, cart, or carriage furnished after the custom of the country, with oxen, horses or other cattle, and all other necessities, and also two able men with such wain, &c. which duty so performed shall excuse every such person from his duty in such parish, &c. in respect of all lands, &c. not exceeding the annual value of 50*l.*, which he shall occupy therein; and every person keeping such team, draught or plough, and occupying in the same parish, &c. lands of the yearly value of 50*l.* beyond the said 50*l.* in respect whereof such team duty shall be performed; and every such person occupying lands, &c. of the yearly value of 50*l.* in any other parish besides that wherein he resides; and every other person not keeping a team, &c. but occupying lands, &c. of the yearly value of 50*l.* in any parish, &c. shall in like manner respectively and for the same number of days, find and send one wain, cart, or carriage furnished with not less than three horses, or four oxen and one horse, or two oxen and two horses, and two able men to each wain, &c. and in like manner for every 50*l.* per annum respectively which such person shall occupy; such wains, &c. to be employed by the surveyor in the repairing the highways within the parish, &c. where such lands, &c. shall lie: And every person who shall not keep a team, &c. but shall occupy lands, &c. under the yearly value of 50*l.* in the parish, &c. where he resides, or in any other parish, &c.; and every person keeping a team, &c. and occupying lands, &c. under the yearly value of 50*l.* in any other parish than that wherein he resides, shall pay to the surveyor in lieu of such duty the sums following, viz. for every 20*s.* of annual value of such lands, &c. one penny for every day's statute duty which shall be required, not exceeding six days in every year; and every person shall in like manner pay one penny for every 20*s.*

[*](C 3.) For what time.

By the st. 2 & 3 Ph. & M. 8. constable and churchwardens, at the election of surveyors, shall appoint four days before Midsummer (and by the st.

of the annual value of the lands, &c. which he shall occupy in any such parish, &c. above the annual value of 50*l.* and less than 100*l.*, and so for every 20*s.* of the intermediate annual value of the lands which he shall occupy, and which shall fall short of the further increase of 50*l.* for each day's statute duty which shall be required. But it is provided that no person keeping such team, &c. and performing duty with the same in the parish, &c. where he resides, and not occupying lands, &c. within the same of the yearly value of 30*l.* shall be obliged to send more than one labourer with such team, &c. And by s. 2. every person who shall not keep a team, draught, or plough, but shall keep one cart or more, and one or two horses or beasts of draught only, used to draw in such carts, shall be obliged to perform his statute duty for the like number of days with such carts, &c. and one labourer to attend each cart, or to pay for the lands, &c. which he shall occupy according to the above rate, at the option of the surveyor; and every person who shall keep a coach, post-chaise, chair, or other wheel-carriage, and not keep a team, &c. nor occupy lands, &c. of the annual value of 50*l.* in the parish, &c. where he shall reside, shall pay to the surveyor one shilling in respect of every day's statute duty for every horse which he shall draw in any such carriage, or shall pay according to the value of the lands, &c. which he shall occupy according to the above rate, at the option of the surveyor. And if any of the said teams, &c. shall not be thought needful by the surveyor on any of the said days, then every such person shall, on receiving notice as therein directed, send unto said work, for every one so spared, three able men, or pay to the surveyor 4*s.* 6*d.* in lieu thereof, at the option of the surveyor; and all such persons shall bring with them such shovels, spades, picks, mattocks, and other tools and instruments as are proper for the purposes aforesaid; and such persons and carriages shall perform such work for eight hours in every of said days within said parish, &c. or in carrying materials from any other parish, &c.: and if any labourer or driver shall be insufficient, or shall refuse to work, the surveyor is thereby authorized to discharge every such team, &c. and recover from the owner such forfeiture as if the same had not been sent. But this statute (s. 4 and 5.) empowered the justices to exempt poor persons from the payment of such rates, and also (by s. 6.) authorized them in certain cases to require the performance of the statute duty in kind. So much of the 13 G. 3. c. 78. s. 38. and 34 G. 3. c. 74. s. 3. as allowed persons to compound at certain rates for the performance of the statute duty, is repealed by the 44 G. 3. c. 52. which enacts that any person liable to perform statute duty by sending one or more teams, draughts or ploughs, with men, horses, or oxen, shall and may compound for the same, by paying to the surveyor of highways (at the time and in manner in the 13 G. 3. c. 78. mentioned) such sum as the justices of peace for the limits wherein the parish, &c. is situate, or the major part of them at their special sessions, to be held in the first week after Michaelmas quarter sessions in every year, shall adjudge to be reasonable, not exceeding 12*s.* nor less than 3*s.* for each team for each day; and in default of their adjudging the same, then the sum of 6*s.*; and for each cart with two horses, or beasts of draught, not exceeding 8*s.* nor less than 3*s.*, and in default of their adjudging the same, the sum of 4*s.*; and for each cart with one horse or beast of draught, not exceeding 6*s.* nor less than 2*s.*, and in default of their adjudging the same, the sum of 3*s.*—The 54 G. 3. c. 109. recites the 13 G. 3. c. 78. and that the assessments which are authorized by that act are not sufficient for the purposes to which the same are directed to be applied; and therefore provides, that further assessments in addition to those under 13 G. 3. c. 78. may be ordered by the justices at sessions for the repair of highways, &c. Notice of the application for such assessment to be given. Id. s. 2.—Rate of such assessment limited. Id. s. 3.—Surveyors of highways, by authority of two justices may require a composition in money instead of the statute duty. Id. s. 4.—Justices at sessions to fix the rates of such composition. Ibid.—Persons to have option of compounding for the whole instead of part of statute duty. Ibid.—Scale according to which persons liable to pay money instead of statute duty shall contribute with relation to annual value of lands, &c. occupied in parish, &c. Id. s. 5.—In what proportions persons keeping coaches, &c. and not keeping teams, &c. nor occupying 50*l.* per annum shall pay in respect of every day's statute duty. Id. s. 6.—Penalty for refusing, &c. to perform statute duty in kind when duly summoned. Id. s. 7.—Justices, &c. in cities, &c. to execute this act as well as justices in counties. Id. s. 8.—Former acts to be in force, save so far as altered hereby. Id. s. 9.—The 55 G. 3. c. 68. s. 6. recites the 54 G. 3. c. 109. s. 6. and that certain other matters relative to the highways are to be done by justices of peace at their special sessions to be holden in the week next after the Michaelmas quarter sessions; and that the time for holding the Michaelmas quarter sessions had been altered by the 54 G. 3. c. 84. to the first week after the 11th of October; and therefore enacts that justices may act at their special sessions in the week after Michaelmas, as formerly in the week after Michaelmas quarter sessions.

5 El. 13. six days) for amendment of the highways, and give notice of the days in the church the Sunday after Easter: and every carriage and labourer shall work eight hours every day, unless licensed by one of the surveyors.

By the st. 22 Car. 2. 12. it is sufficient, if the highways be amended before St. Luke's day, though not before Midsummer.

Surveyors shall appoint six days for work in the highway, with regard to the season of the year and weather, and giving notice publicly some convenient time before the several days.

By the st. 1 Geo. 52. justices of peace at their special sessions may order great roads to be first amended, and at what time, and in what manner to be done, to which the surveyors are to conform.

[*]And surveyors shall summon teams and labourers to come in at the first seasonable days the year shall afford, and shall repair such as the justices, or, in their default, as they think needful in the first place.

(C 4.) To provide materials.

By the st. 5 El. 13. surveyors may take rubbish in any quarry of a parish, if ready digged; and if no such, may dig in the several ground of a parishioner (not his house, garden, orchard or meadow) for gravel, sand, or cinders for highway, without licence, so as he dig but one pit, not above ten yards over, and in a month after fill it up, at the charge of the parish, on pain of five marks for every default to the owner by action of debt, &c.

Justices cannot make an order to dig over all an estate, and leave it to the discretion of the surveyor where; they must fix on the particular part. 1 B. M. 377.

They must award satisfaction to the owner, as well as the occupier. Ibid.

They must specify what kind of materials cannot be found in the waste grounds: for they cannot dig in private grounds (for all kinds of materials, merely) because some kind of materials are not to be found in wastes, if other proper may. Ibid.

They cannot try the materials in private soil; they should previously know, or have reasonable prospect of finding them. Ibid.

By st. 13 G. 3. c. 78. s. 27, 28. and 13 G. 3. c. 84. s. 61. surveyor may take refuse stones of any quarry in his own parish without owner's consent, but not to dig; and he may in any common ground or river, in his own parish (or any other, leaving sufficient for themselves) get gravel, &c. or gather stones in his parish, without satisfaction, but satisfaction for damage done; owner's consent must be had to gather stones, or licence from a justice. This extends not to stones thrown up by the sea called beach.

Cap. 78. s. 79. If sufficient materials cannot be had in common grounds, surveyor may search in inclosed grounds in his own parish, or by licence from two justices in special session in other parishes, and to take what he thinks necessary, making satisfaction; if they cannot agree, to be settled by one justice. Clay may be got where any other materials may, and may be burnt on any common ground. Materials must not be taken, if owner gives notice he shall want them to repair roads, without an order of two justices, after hearing.

S. 31. Surveyor shall fence in holes made in getting materials, whilst open; if no materials found, to fill it up, and cover it with turf, in three days; if materials found in fourteen days after digging enough, to fence, slope, or fill up; in twenty days after appointment, to fill up or slope all holes not likely to be used; if likely to be used, to fence them with posts and rails, on pain of 10s. for every default; and if he neglects it for six days after notice

from a justice, the owner, or a commoner, to forfeit from 10*l.* to 40*s.* for every neglect.

S. 32. Materials for another parish must be carried between 1st April and 1st November, or in hard frost.

S. 33. Persons digging materials, whereby bridge, mill, building, [*]dam, highway, ford, mines, or tin-works, may be endangered, forfeit from 5*l.* to 20*s.*

S. 50. If sufficient materials cannot be got by statute-duty, surveyor may contract for the same, at a meeting to be held on ten days notice. Surveyor not to be concerned in contract, without licence from a justice, under penalty of 10*l.* and incapacity to be surveyor.

By st. 13 G. 3. c. 84. s. 36. turnpike surveyor may contract for materials ; to have no share in the contract without licence, on pain of 10*l.* and incapacity.

S. 70, 71. He may, with the approbation of trustees, apply the tolls and statute-duty in the execution of the powers in the highway acts, for providing materials, enlarging, turning, stopping up and selling roads, making drains, cutting trees and hedges, and calling out the labourers (for the proportion of labour) as the parish surveyors may, making the same satisfaction for materials and damages as they ought to make.

(C 5.) To remove obstructions.—Watercourse.

By the st. 5 El. 13. surveyors may turn a watercourse out of the highway into any ditch of another's several ground adjoining to the highway, as they think meet.

By the st. 18 El. 10. if a bank be between the highway and ditch, the surveyors, &c. may make sluices through the bank to let the water out of the highway into the ditch.

By the st. 1 Geo. 52. if any, who ought to scour ditches or watercourses near an highway, neglect for thirty days after notice by the surveyors, or leave the earth eight days after scouring, he shall forfeit 2*s.* 6*d.* for every eight yards of ditch not scoured, on the oath of the surveyor before justices at the quarter sessions, and for other offence, a sum not exceeding 5*l.* nor under 20*s.*, to be levied by distress and sale, &c.

By stat. 13 Geo. 3. 78. s. 8. occupiers of lands shall make and scour sufficient ditches, drains, and watercourses, and lay bridges at cart-ways, &c. and occupiers of land where the waters used to pass, shall scour, &c. on pain of 10*s.* on ten days notice. (x)

(C 6.) Trees, hedges, &c.

By the st. 5 El. 13. ditches, fences, &c. shall be scoured, repaired, and kept low, and trees and bushes growing in a highway shall be cut [*]down by the owner of the ground, that the way may be open :—and by the st. 18 El. 10. upon pain of 10*s.* for every default.

(x) 1. S. 12. The surveyor is to view all highways, and if any nuisance, to give personal notice, or leave notice in writing at the place of abode, and if not removed, ditches cleaned, bridges made or mended, hedges pruned, (trees are not mentioned in this sect.) in twenty days, he is to do it ; and the person neglecting, forfeits 1*d.* per foot of the ditch not cleaned or hedges pruned, besides the charges ; and on non payment, to apply to a justice, who, on proof of notice as aforesaid, and of the work done by surveyor, and the charge, he shall be repaid on demand ; or in default, it shall be levied as other penalties in the act.—2. S. 14. Where the ditches, &c. are insufficient, new ones may be made by surveyor, by order of one justice, through any lands, making bridges, for convenient enjoyment of the lands, and satisfaction for the damage, to be settled as getting materials.

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And by the st. 18 El. 10. the occupier of ground adjoining to the grounds next an highway, shall scour his ditches when needful, that the water from the highway may have passage over the grounds next adjoining, on pain of 12d. per rood not scoured.

And none, in scouring a ditch, shall throw the soil into the highway leading to a market town, and let it lie there six months, on pain of 12d. per load.

By the st. 3 & 4 (or 3) W. & M. 12. the owners or occupiers of land shall scour ditches, drains, &c. next an highway, carry away the earth taken thence, lay sufficient trunks, bridges, &c. where cartways are in their grounds, in ten days after notice from the surveyor, on pain of 5s., to be levied by distress and sale, on proof by one witness before two justices of the peace, a moiety to the informer, a moiety to the repair of the highway.

And shall cut down, &c. any tree, bush, &c. in an highway, not twenty feet broad, in ten days after notice by the surveyor, on pain of 5s., to be levied, &c. And shall keep their hedges pruned right up from the roots, and not permit trees to hang over the highway, &c.

And the surveyors after view, &c. shall give notice the next Sunday in the church, and if not removed in thirty days, shall in thirty days remove, &c.

And the surveyors, if need is, may make new ditches, &c. in the lands next to an highway, and keep them cleansed, and enter the land for that purpose. (y)

(C 7.) Rubbish, dung, &c.

By the st. 3 & 4 (or 3) W. & M. 12. none shall lay, in an highway, not twenty feet broad, any stone, timber, straw, dung, &c. by which it shall be annoyed, on pain of 5s., to be levied by distress and sale, on proof by one witness before two justices of peace, a moiety to informer, a moiety to repair of the highways: and the owners or occupiers of lands next the highway shall, in ten days after notice by the surveyor, remove such nuisances, and take them to their own use, on pain of 5s. to be levied, &c. And the surveyors the next Sunday after view of any annoyances, &c. shall give notice in the church after sermon, and if [*]not removed in thirty days after, shall in thirty days remove them, and dispose of them for the repair of the highways, and be reimbursed their charges as any justice of peace shall think fit to allow, on oath of such notice, &c. to be levied, &c.

By the st. 7 & 8 W. 3. 29. if any be convicted by the oath of one witness, or view of a justice of peace, of an offence in pulling down, &c. any post, stone, or bank, &c. for securing any horse or foot causeway, he forfeits 20s.; a moiety to the discoverer, and a moiety for repair of the highway, to be levied, &c.

(y) By stat. 13 G. 3. c. 78. s. 6. no tree or shrub to stand in a highway, within fifteen feet of the centre, on pain of 10s. after ten days notice, except for ornament, or shelter of the house, building, or court-yard of the owner.—2. S. 7. Possessors of land next adjoining shall cut their hedges, and cut down or lop trees growing in or near their fences, that sun and wind be not excluded (except trees for ornament); if not, on ten days notice from a surveyor, he is to complain to justice, who shall summon possessor to appear at a petty sessions, who shall order them to be cut in such manner as may best answer the purposes: if not done on ten days notice, he forfeits 2s. for every twenty-four feet of hedge, and 2s. for every tree; and the surveyor is to do it, and possessor to pay for it, besides the penalties, to be levied by warrant of one justice.—3. S. 13. Hedges to be pruned only from the last of September to the last of March. None are obliged to sell timber trees in hedges, unless when the road is ordered to be enlarged; or to cut oaks in the highway, but in April, May, or June, and other trees in December, January, February. or March.

By st. 13 G. 3. c. 78. s. 9. whoever lays stone, timber, straw, &c. in highway, or leaves the earth of ditches, so as to obstruct, five days after notice, for every offence, forfeits 10s.

And by s. 10. if it is within fifteen feet of the centre, and not removed in five days notice from the surveyor, or any person aggrieved, any person may take it for his own use.

S. 11. Whoever sets waggon, cart, carriage, plow, or instrument of husbandry, in highway (except to unload) so as to obstruct, forfeits for every offence 10s.

S. 63. Collector of tolls on a bridge shall not keep alehouse, on penalty of 5l.

S. 64. Person making fence on highway not turnpike, within fifteen feet of centre, or breaking up soil, or turning plow or harrow within fifteen feet where the road is formed, and the breadth marked with certainty, and is not above thirty feet, forfeits 40s. to informer: and surveyor may take down the fence at offender's expence, and one justice may levy forfeiture and expences by distress.

By stat. 13 G. 3. c. 84. s. 37. turnpike surveyor suffering rubbish, &c. to lie within ten feet of the middle of the road for four days, forfeits 40s.

S. 38. Person making fence within thirty feet, or breaking soil, or turning plough or harrow within fifteen feet of centre of turnpike-road, forfeits 40s. to the informer; and five trustees may take down the fence at offender's expence, and one justice may levy the expences and forfeiture on oath, by distress.

(C 8.) To enlarge highways.

By the st. Wint. 13 Ed. 1. 5. highways from market to market shall be enlarged, and no bushes, &c. on 200 feet on one side or other.

By the st. 3 & 4 (or 3) W. & M. 12. surveyors shall make the highway to a market town eight feet wide at least, and as near as may be, even and level; and no horse causeway shall be left less than three feet wide.

By the st. 8 & 9 W. 3. 16. justices of peace at the quarter sessions, being five at least, may enlarge any highway, not taking in above eight yards, so as not to pull down a house, or take the ground of a garden, orchard, court, or yard; and may impanel a jury to assess on oath the damage to the owner, &c. of the ground taken in, not above twenty-five years purchase, and for making a new ditch, &c. on payment whereof to the owner, or leaving it with the clerk of the peace, the said ground shall be the public highway.

But the justices of peace shall first summon the owner to appear at [*] the next quarter sessions, and the owner may cut down within eight months all timber, &c. on the ground so taken in, or, in his default, the justices may order the selling, and account for the same.

And the owner may appeal to the judge at the next assizes, who may affirm, or reverse and give costs, to be levied by distress and sale, &c.

And the justices of peace may make a rate not exceeding 6d. per pound to pay the purchase, to be levied, on non-payment in ten days after demand, by distress and sale, &c.

And after an inquisition for enclosing part of an highway, on an *ad quod damnum*, any may appeal to the next quarter sessions, whose determination, or the filing and recording the return of inquisition by the clerk of the peace, if no appeal shall be final.

By the same st. 8 & 9 W. 3. 16. justices of peace at the special sessions may order surveyors to erect posts, &c. at cross ways, who neglecting for
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three months, forfeit 10s. to be levied by distress and sale, or warrant of any justice of peace for erecting such post, &c.

By stat. 13 G. 3. c. 78. s. 15. every public cart way leading to a market town, shall be twenty feet wide at least, and every public horseway or draft-way of eight feet at least.

S. 16, 17, 18. Two justices may order roads to be widened, or diverted and turned, but not to exceed thirty feet in breadth, nor to pull down building, nor take ground of garden, park, paddock, court, or yard; satisfaction to be made by surveyor under the direction of the two justices taking the view; if they cannot agree, the two justices to certify to the quarter-sessions, and on proof of fourteen days notice, they shall impanel a jury who shall settle it, but not above forty years purchase; and on payment or tender, or leaving it with the clerk of the peace, if the owner cannot be found, or refuses to accept, it shall be deemed a highway. Money may be raised by assessment by order of quarter sessions, not exceeding 6d. in the pound in one year: the old road to be stopped up, and the land sold by the surveyor subject to right of passage to any house, &c. which cannot be accommodated by the new; but mines and minerals are reserved to the former owner. The costs shall be borne by surveyor, if the verdict is for more money than he offered; if for less, by the party refusing to accept it.

This extends to roads *ratione tenuræ*; and on disobedience to the order of the justices, the party may either be proceeded against summarily by the statute, or by indictment. Cowp. 648.

S. 19. Two justices may turn a road with consent under hand and seal of the owner of the new one; persons aggrieved may appeal from this, or from inquisition on *ad quod damnum*, to quarter sessions, who shall finally determine; old road not to be stopped till new one finished; where a road has been turned above twelve months, and no suit or prosecution, the new one shall be deemed the road.

The stat. 34 Geo. 3. c. 74. s. 7. continues the provisions of this act, excepting in the instances specifically mentioned.

S. 20. Common land lying between the fences of the old road shall not be inclosed; if not common land, and it exceeds thirty feet, and is under fifty feet in breadth, satisfaction shall be made to the owner for what it exceeds thirty feet; if it exceeds fifty feet, or lies through the [*]open field of another, the owner of such adjoining land shall have the land of the old highway, paying the surveyor for thirty feet.

S. 21. Footways changed, the damage to be settled by two indifferent persons, or a third chosen by them.

S. 22. Where highways are diverted, justices may stop up unnecessary highways, and sell the soil.(x)

(x) 1. The power of two justices, under 13 Geo. 3. c. 78. s. 16. to order any highway to be widened, extends to roads repairable *ratione tenuræ*. Cowp. 648.—2. The justices may proceed for disobedience of their order, under 13 Geo. 3. c. 78. either summarily or by indictment. Cowp. 648.—3. An order of magistrates, under st. 13 Geo. 3. c. 78. for turning a road, must pursue the form prescribed therein; therefore, unless it states the exact length and breadth of the new road set out, it is a nullity. 1 East, 64.—4. Widening an existing highway is not equivalent to setting out a new one. 8 East, 394.—5. An old highway cannot be stopped up, under st. 13 Geo. 3. c. 78. s. 19. before a new one is set out. 8 East, 394.—6. Where a road is stopped up by order of justices, and a new one is substituted, partly over the ground of a stranger and partly over an accustomed road, that is a sufficient compliance with 13 Geo. 3. c. 78, provided the new road convey the public to the same place as the old one did. 1 Mars. 261. 5 Taunt. 634.—7. Where road trustees, after turning a road over private grounds, have the power of summoning a jury, no notice to the landholder, to assess a compensation for the damage done to him, &c. such inquisition, &c. will be

[*](C 9.) To make rates.

By the st. 3 & 4 (or 3) W. & M. 12. justices of peace at the special sessions, on oath of a sum expended for materials, &c. or two of them, may by warrant cause a rate to be made on the inhabitants, &c. pursuant to the poor's rate, to be levied by distress and sale, &c.

And justices of peace at the quarter sessions, being satisfied that the highways cannot be otherwise repaired, may order an assessment not exceeding 6*d.* per pound of real, and for 20*l.* of personal estate, on the inhabitants rateable to the poor, for repair, &c. which on non-payment in ten days after demand, shall be levied by distress and sale, &c. And the justices of peace at any quarter-sessions may redress any person aggrieved.

By the st. 7 & 8 W. 3. 29. if a vill, &c. using to repair its own ways, after a rate of 6*d.* in the pound, cannot sufficiently repair them, the justices of peace at special sessions may order the whole parish to repair.

So, by the st. 1 Geo. 52. justices at quarter-sessions may order an assessment, &c. before all the labourers, &c. have done their work.

The order must shew, that the statute labour is not sufficient. Strange, 315.

It must not be on the occupiers of land only, for others are equally liable. Ibid.

Order to make a rate on other parishes, because, that parish not suffi-

set aside, unless it clearly appears on the face of the proceedings, that notice was given. 7 T. R. 363.—8. Where an order of justices, for diverting and turning a road, recites that they had viewed the new road, and found it to be in good condition and repair, held to be a sufficient certificate thereof, under 13 Geo. 3. c. 78. s. 19. 1 Mars. 261. 5 Taunt. 634.—9. The depositing the certificate with the clerk of the peace, is a sufficient enrolment, within 13 Geo. 3. c. 78. s. 19. 1 Mars. 261. 5 Taunt. 634.—10. The quarter sessions are not, under any circumstances, bound to receive an appeal against an order of magistrates turning or stopping up a road, unless ten days notice has been given, pursuant to st. 13 Geo. 3. c. 78. s. 19. 7 T. R. 81.—11. Even admitting that the term "proceeding," as used in stat. 13 Geo. 3. c. 78. s. 19. means proceeding under an order, yet the party is to be considered as aggrieved from the time he knew that the road was actually obstructed; and the knowledge of a servant is that of his master, unless the master deny that he knew of it. 2 East, 213.—12. It seems that the term "proceeding," in st. 13 Geo. 3. c. 78. s. 19. giving an appeal against an order for stopping up a road, as used as descriptive of some legal procedure similar to order; so that the appeal must be made at the next sessions after the order made, if, &c. and not from the actual obstruction of the road. 2 East, 213.—13. An appeal against an order for stopping a road was given by stat. "to the party grieved by any such order or proceeding, at the next quarter sessions after such order made, or proceedings had," &c. The appeal must be to the sessions next after the order made, though no notice of the order was received by the appellant. 3 East, 151.—14. An order is made by two justices, under the stat. 13 Geo. 3. c. 78. for diverting and turning a public highway; and afterwards a second order, for stopping it up. There is time sufficient for the party grieved to appeal to the next sessions, if you reckon from the first order, but not if from the second. The time is to be computed from the second. 3 M. & S. 459.—15. Sect. 19 of st. 13 Geo. 3. c. 78. directs that when any highway hath been diverted above twelve months, &c. if a new highway hath been made in lieu thereof, &c. and the same hath been acquiesced in, &c. every such new highway shall from henceforth be the public highway. "Henceforth" is not to be read "thenceforth;" so that the clause is retrospective only. 8 T. R. 133.—16. This section of the statute has only a *retrospective* view, and refers alone to those roads which had been diverted at the time of passing the act. 8 T. R. 133. Persons liable to repair the old road are liable to repair the new; and so by stat. 13 Geo. 3. c. 84. s. 63. as to turnpike roads turned.—17. And now by 55 G. 3. c. 68. justices of peace at special sessions may divert, &c. public highways, bridleways, and footways, and stop up, &c. unnecessary highways, &c. Ibid. Notice to be inserted in newspapers and affixed to church door, &c. Order returned to the quarter sessions, and there confirmed and enrolled. Ibid. Persons injured by any such order, &c. may appeal to quarter sessions. Ibid. If no appeal or order confirmed, proceedings conclusive. Ibid.

cient, good ; though it does not appear whether it was made before the six days work done or not. Fort. 327.

By stat. 13 G. 3. c. 78. s. 16. two justices in case of agreement, or quarter-sessions, may grant 6*d.* assessment to pay for enlarging highways.

S. 30. On application and oath of surveyor, of the sums expended or wanted for buying materials, direction posts, bridges, watercourses, and salaries, justices in special sessions may order assessment not exceeding 6*d.* in the pound.

S. 45, 46. Quarter or special sessions, if satisfied that highway cannot be amended by statute duty, may (on a week's notice at church) grant assessment for repairing them. But this assessment, with the former for buying materials, &c. shall not exceed 9*d.* in the pound, nota ; the assessment for enlarging not included.

S. 48. Surveyor's duty is to collect monies within the year, to keep books of the receipt and expenditure, for what, and to whom ; of monies due ; of tools, materials, &c. provided ; and shall produce it, and the assessments made, at a parish meeting, within fifteen days before special session after Michaelmas ; and carry them to a justice on a day to be then agreed on, before said special session, and verify it on oath, if required. Justice may allow account, or postpone it to special sessions, who may allow, on the articles objected to by the justice being verified by proper evidence, or disallow. Accounts allowed or disallowed to be transmitted to churchwarden or overseer, to be kept for the parish. Surveyor to deliver duplicate, and also all money, tools, &c. to new surveyor, who may recover all sums due, as the former. Surveyor not providing books, or not entering accounts or lists, or [*]delivering them and duplicate, forfeits from 5*l.* to 40*s.* ; not paying or accounting for money remaining, forfeits double. Surveyor dying, his executor must account, under the same penalties. Surveyor pays justices' clerks 1*s.* for appointment and charge, 6*d.* for bond, 1*s.* for account and oath. Whoever takes more, forfeits 10*l.*

No appeal lies to the quarter sessions against the allowance of the surveyor's accounts. 5 T. R. 629. 701.

S. 51. Surveyor for any neglect of duty not specified, forfeits from 5*l.* to 1*s.* at the discretion of justice or justices having jurisdiction.

S. 68. Assessment not paid ten days after demand may be levied by distress, by warrant of one justice ; on default of distress, the party committed till assessment and costs paid.

(C 10.) To restrain carriages.—This is omitted in the st. 6 Anne 29.

By the st. 22 Car. 2. 12. the owner of a waggon, &c. (if not employed for carrying hay, straw, corn (unthreshed), or about husbandry, or for coals, chalk, timber for shipping, materials for building, stones, ammunition for the king's service,) travelling in the highway with above five horse beasts at length, unless by pairs, shall forfeit for every offence 40*s.* a third to the surveyor, a third to the poor, a third to the informer, to be levied by distress and sale, &c. on warrant to the high constable or other officer.

By the st. 3 & 4 (or 3) W. & M. 12. the justices of peace, at quarter sessions at Easter yearly, shall set the prices of land-carriage, and certify them to the mayor, or other chief officer of every market town ; and a carrier taking more forfeits to the party grieved 5*l.*, to be levied by two justices of peace, by distress and sale, &c.

By the st. 7 & 8. W. 3. 29. the owner of a waggon, &c. (not employed *ut supra* by the st. 22 Car. 2. 12.) drawn with more than eight horses, or eight oxen and a horse, or six oxen and two horses, or six horses and two oxen, or four oxen and four horses, which shall draw in pairs in double shafts, or a pole between as coaches, shall forfeit 40s. only for every offence, two-thirds for the highway, a third to the informer, to be levied by distress of one of the horses or oxen by the constable, surveyor, or overseer, and on nonpayment in three days with charge, &c. by sale. And the penalty shall be levied by warrant of one justice, &c. and paid to the surveyor only, who shall account for it on oath at the special sessions, and pay it only to the parish where the offence was. And any person compounding with or taking of a waggoner, &c. any sum of money by way of reward, &c. for any offence against this statute, forfeits 40*l.*, a moiety to him who sues, a moiety for the repair of the highway.

By the st. 6 Ann. 29. if above six horses or beasts in length forfeits 5*l.*, a moiety to the surveyor, a moiety to the prosecutor, if an inhabitant, to be levied, &c.

By the st. 9 Ann. 18. any person may seize any or all the horses or beasts of the offender, and deliver them to the parish officer, who on non-payment in three days, by warrant of one justice may sell, &c. *ut supra*.

[*]By the st. 5 Geo. 12. the owner shall forfeit all horses, &c. in a waggon for hire above six, and in a cart, &c. above three.

[By st. 13 G. 3. c. 78. ss. 56, 57.—

Waggons with 9 inch wheels to be drawn by 8 horses.

6 inch rolling 9 inches	7
6 rolling 6	6
Less than 6	5

Carts with 9 inch wheels, to be drawn by 5

6	4
Less than 6	3

Carriages on 16 inch wheels or rollers, any number.

For every horse above the number, owner forfeits 5*l.*, driver not owner 10s., to informer. Information before justice must be in three days, action in one month, and informer must give notice on the day the offence is committed of an intention to complain. If offender lives remote, justice may dismiss complaint, and leave informer to his remedy by action.

S. 58. Michaelmas quarter sessions may license an increased number of horses, up hills, or in roads not turnpike.

S. 59. Justices may stop proceedings, on oath of credible witnesses, that a carriage, by reason of snow or ice, could not be drawn by the number of horses allowed.

Number is not limited for one stone, rope, piece of metal or timber, or the king's artillery or ammunition.

Two oxen to be considered as one horse. So also by st. 13 Geo. 3. c. 84. 67.

By st. 13 Geo. 3. c. 84. five trustees of turnpike may erect weighing engine; and for weights exceeding the following, for the carriage and loading—

	Summer.		Winter.	
	Tons.	Cwt.	Tons.	Cwt.
Waggon, 16 inch rollers,	8	0	7	0
9 inch rolling 16,	6	10	6	0
9 inch,	6	0	5	10

6 inch rolling 11,	-	5 10	5 0
6 inch,	-	4 5	3 15
Waggons less than 6 inch,	-	3 10	3 0
Cart 9 inch,	-	3 0	2 15
6 inch,	-	2 12	2 7
Less than 6,	-	1 10	1 7

From 1st May to last October, summer ; the rest winter.

	cwt.		s.	d.	
For not above 2	} over-weight,	0	3	} per cwt,	
5		0	6		
10		2	6		
15		5	0		
above 15		20	0		

(This by 14 Geo. 3. c, 82.)

S. 2. Keeper of gate at engines to weigh all loaded carriages that he has reason to suspect, on penalty of 5*l*.

S. 3, 4. Trustee, creditor, clerk, treasurer, or surveyor, may oblige carriage to go back 300 yards to be weighed, tendering 1*s*. Turning [*]places to be made within 300 yards of engine. List of such persons at each engine. Driver refusing to return, forfeits 40*s*. and any person may drive carriage back.

S. 6. These weights extend not to carriages employed in husbandry only, or carrying only manure, hay, straw, fodder, or corn unthreshed. Where lime or manure is allowed to pass toll-free, or for less toll, the carriage and loading may be weighed, and pay for overweight. (And by 14 G. 3. c. 82. they shall not be weighed.)

S. 7. Quarter sessions, on complaint of one justice, two creditors, or two trustees, may summon clerk, surveyor, and treasurer of turnpike, to shew cause next sessions why engine should not be erected, and order it to be erected ; and trustees shall erect it forthwith, and treasurer pay for it out of the tolls.

S. 8. Where two turnpike roads meet, they may join for an engine.

S. 9. 25. No composition for carriages with wheels less than six inches broad, and unless the fellies and tire lie flat.

S. 10. Person unloading goods before they come to the engine, or loading after they have passed it from carriage or horse belonging to or borrowed by the carrier, to avoid the 20*s*. per hundred weight toll ; or if he shall so unload, in order to carry considerable quantities of goods through the same day, and thereby pay less toll than if they had not been so unladen ; on conviction before one justice, on oath of one witness, owner forfeits 5*l*., driver, not owner, shall be committed to house of correction for one month.

S. 11. Driver turning out of road to avoid weighing, if owner, forfeits from 5*l*. to 20*s*. ; not owner, 50*s*. to 10*s*.

S. 13, 14, 15, 16. 18, 19, 20, 21.—

Waggons with 9 inch wheels may	} And up hills 10 horses,		
have		8 horses	
6		6	rising 4 inches 7
less		4	in a yard (with 5
carts 9		5	permission of 6
6		4	trustees and 5
less		3	quarter-sessions) 4

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Carriages with 16 inch rollers, any number.

In deep snow and ice, any number.

On road where there is a weighing engine, any number.

Horses in 9 inch carriages to draw in pairs, except an odd horse, or not more than four; for every offence owner forfeits 5*l.* (driver, not owner,) 20*s.* to the informer. Prosecution before justice must be commenced in three days, action in one month, and notice given to the driver on the day of the offence. If offender lives remote, justice may dismiss complaint, and leave informer to his remedy by action.

Horses in carriages with wheels under nine inches shall not draw in pairs, except with six inch wheels authorized by turnpike-meeting, and carriages with two horses only. *Nota*; no penalty here mentioned.

Persons acting as driver with more horses, or with carriage not marked, may be carried before one justice, and forfeits from 5*l.* to 10*s.*

S. 59. Justices in Wales may augment the number of horses at Michaelmas quarter-sessions.

[*] S. 17. Taking off horses, or altering distance of wheels before coming to gate, forfeits 5*l.* before justice, one witness.

S. 22. Trustees may mitigate high (prohibitive) tolls as to six inch wheeled carriages, so as not to take more than for waggons drawn by four, and carts drawn by three horses. (And by 14 G. 3. c. 82. within ten miles of London may mitigate these tolls for all carriages.)

S. 23. Trustees, &c. to take one half more than the tolls imposed, for narrow wheeled carriages, and after Michaelmas 1776, double toll.

S. 24, 25. No exemption from toll by virtue of former acts to be claimed, unless for six inch wheels, (except for carriages used in husbandry only; and unless the fellies and tire lie flat.

S. 26. Carriages on sixteen inch rollers toll free for one year, and by 14 G. 3. c. 82. for five years, and then pay only half toll.

S. 27. Chaise marine, coach, landau, berlin, chariot, chaise, chair, calash, hearse, carriage with the king's ammunition or artillery, carriage with one horse or two oxen, and nine inch wheeled carriage, with one piece of stone, metal, timber, or rope not included.

S. 28. Persons taking advantage of any exemption fraudulently, shall forfeit from 5*l.* to 40*s.*

S. 29, 30. Trustees at a meeting on a month's notice may reduce tolls, with consent of five-sixths in value of the creditors; and advance the tolls again.

S. 31. Trustees on a month's notice may let the tolls to the best bidder; if he takes more or less tolls than directed, he forfeits 5*l.* and the contract: other gate-keeper forfeits 40*s.*

S. 34. No side-gate shall be erected but by nine trustees, on twenty-one days notice; and no person shall pay at cross or side-gate, unless he goes 100 yards on the turnpike road, or (by 14 G. 3. c. 57.) except specified in some former statute.

S. 35. Person subscribing to turnpike may be sued for non-payment.

S. 51. If trustees erect turnpikes contrary to their power, quarter-sessions may summarily determine, and order sheriff to remove them.

S. 52, 53. Mortgagee in possession of turnpike, shall account on oath, on fourteen days notice, on pain of 10*l.* to be recovered before one justice, and applied to the roads, and if he keeps possession after he has received what is due, he forfeits double the surplus received, and treble costs.

S. 54. If gate-keeper dies, two trustees may appoint another till next

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meeting. Gate-keeper removed, refusing to deliver possession of house, &c. in two days, or the wife of one dead in four days, one justice may order constable to turn them out, and put the new one in possession.

S. 45. 55. Clerks, treasurers, &c. shall deliver up accounts and paper, on ten days notice from five trustees, or forfeit 20*l.* and gate-keeper's account for money unaccounted for on pain of 5*l.* to be recovered before one justice.

S. 56. Gate-keeper shall not be removed as a pauper, unless actually chargeable. No settlement gained by gate-keeper, or renting tolls and residence. Tolls and toll-house not rateable.

S. 57. Gate-keeper suffering carriage with too many horses, or without name, &c. and not informing in a week, forfeits. 40*s.*

[*]S. 60. No toll to be paid for carriages solely employed in carrying materials to repair the highway.

S. 66. A table of tolls shall be put at every turnpike, and trustees shall see that the weighing-engines are in order.

S. 69. From Michaelmas 1776, the tire shall be counter sunk, so that the nails shall not rise above the surface, which shall be quite flat.

St. 16 G. 3. c. 39. repeals the clause in 13 G. 3. c. 84. relating to countersinking the nails; and enacts that six inch tire of wheels not deviating more than one inch from a flat surface shall be deemed flat.

The act 13 G. 3. c. 84. except such parts as have been varied, altered or repealed, by any subsequent acts of parliament, and except so much thereof as gives an additional term of five years to acts for repairing particular turnpike roads, shall be taken to extend to all acts of parliament which have been made since the time of passing that act, and which shall hereafter be made, for amending and repairing any turnpike roads within England. St. 21 G. 3. c. 21.]

(C 11.) To present offences.

By the st. 5 El. 13. the surveyor, within a month after an offence against the st. 2 & 3 Ph. & M. 8. or this act, shall present it to the next justice of the peace on pain of 40*s.* who shall certify it to the next quarter-sessions, on pain of 5*l.* where the justices of peace may enquire and fine for the same, as they think meet.—So by the st. 22 Car. 2. 12. within a month after any default, &c.

By the st. 22 Car. 2. 12. surveyors and constables shall put all acts in force for the repair of the highway in execution, on pain of paying, if convicted of neglect before any justice of peace by one witness, or view of the justice, what the justice shall impose not exceeding 40*s.* to be levied by warrant, &c. to the high constable, &c. by distress and sale, &c. for repair of the highway.

By the st. 3 & 4 (or 3) W. & M. 12. surveyors, in fourteen days after office accepted, and every four months after, shall view all roads, bridges, &c. in the parish to be repaired by the parish, and present on oath the condition he finds them in, on pain of 5*l.* unless he be excused by two justices of peace. And at the special sessions, &c. shall make presentment on oath, &c. and shall give account of what money received, and how disposed of, and the residue deliver to the next surveyors, on pain of double the value, to be levied, &c. And the surveyors, for every neglect against this act, shall forfeit 40*s.* to be levied, &c.

So by the st. 1 Geo. 52. surveyors shall view, &c. and give account in writing on oath of the defects of the highways, and of the neglects of labour-

ers and of those who ought to find labourers or teams, &c. on the same pain as is for refusing the office.

[By stat. 13 G. 3. c. 78. s. 60. and stat. 13 G. 3. c. 84. s. 68. owner's name and abode shall be painted in large legible letters, on conspicuous part of waggon, &c. and on doors of coaches, &c. let to hire ; and waggons, &c. travelling stages, shall have common stage waggon ; and person using it without, or painting false inscription, forfeits 5*l.* to 20*s.*

[*]S. 61. and by stat. 13 G. 3. c. 84. s. 40. Driver riding in his waggon, unless some other on foot or horseback to guide, or he has reins to conduct the horses, or who by negligence hurts any person, or goes on the other side the fence, or is so distant that he cannot direct, or by negligence interrupts the passage, or driver of empty waggon who refuses to make way for coach, &c. or loaded carriage ; whoever drives a coach let for hire, without name or refuses to discover owner's name, forfeits on conviction before one justice, by confession, view or oath, 20*s.* if owner, 10*s.* if not ; or commitment for one month, or till payment ; and may be apprehended without warrant, to be carried before justice ; if he refuses to discover his name, may be committed for three months, or proceeded against by description, without name.

S. 62. Two justices may hold special sessions when they please, giving notice to the other justices in the limits.]

(C 12.) Presentment upon view of a justice of peace.

By the st. 5 El. 13. any justice of peace on his own knowledge may, in the open general sessions, make presentment of an highway out of repair, or any offence against this act, or the st. 2 & 3 Ph. & M. 8. which shall have the effect of a presentment by twelve men ; and the justices of peace at the same sessions may fine, &c. saving to the party his traverse. Vide 2 Sand. 157. Keel. g. 34.

[The presentment of a justice may be traversed generally. 3 B. M. 1530. 1 Bl. Rep. 467.]

If the party traverses, he admits it to be an highway, and that it ought to be repaired, as well as upon an indictment. R. 4 Mod. 38. Sho. 270.

So he cannot traverse the want of repair, for that is determined by the justices. R. Keel. g. 34.

And if the jury find upon the traverse, that the highway wants repairing, but that it is not an highway, the last words shall be rejected. R. 4 Mod. 38.

And therefore, if the inhabitants presented ought not to repair, they should plead *reparare non debent*. 4 Mod. 38.

By st. 13 G. 3. c. 78. s. 24. justices of assize, of counties palatine, and of grand sessions of Wales, on view, and justice of peace, on view or information on oath of surveyor, may present highway, causeway, or bridge, not in repair, or any offence against this act. Traverse saved. Offenders may be fined. Quarter sessions may order prosecution at expence of the limit.

[S. 25. Justices in special sessions may order what road shall be first repaired, and how.

S. 26. They may order direction posts where several roads meet, and graduated and direction posts at waters ; and so by st. 13 G. 3. c. 84. s. 41. may the trustees on turnpike-roads : and also order mile-stones ; and if surveyor neglects to erect or repair for three months, he forfeits 20*s.*]

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(C 13.) Remedy for fines, &c.

By the st. 2 & 3 Ph. & M. 8. and the st. 5 El. 13. fines, assessed at the quarter sessions for offences against those acts, shall be estreated by the clerk of the peace, who shall deliver one part of the estreats [*]indented to the constable and churchwardens of the parish, the other to the high constable, who shall levy the same by distress for the repair of the highways, and if no distress, or he pay not in twenty days, he shall pay double.

And the high constable shall yearly account, on pain of 40s. and the constable and churchwarden may call him or their predecessors to account before two justices of peace, who may commit till the arrears are paid, allowing 8d. in the pound for collection, and 12d. to the clerk of the peace.

By the st. 18 El. 10. fines for any offence against this act shall be levied by distress and sale, as fines and amerciaments in leets, of which the justices of peace at sessions, and the stewards of leet, shall have cognizance.

By the st. 22 Car. 2. 12. any convicted of resisting execution, or rescuing distress, &c. shall forfeit 40s. and on non-payment in seven days, shall be committed to gaol by any justice of peace near, till payment, for repair of the highway.

All presentments shall be in the county where the highway lies.

By the st. 3 & 4 (or 3) W. & M. 12. no fine shall be returned into the exchequer, but paid to the surveyor for repair of the highway. And if a fine imposed on a parish be levied on one or more inhabitants, on complaint, two justices of peace at special sessions may cause a rate for reimbursing him, which being confirmed by two justices of peace, the surveyor may collect and levy within a month and pay to him.

And none shall be punished by this act, unless prosecuted in six months after offence. And all offences shall be determined in the county.

By the st. 1 Geo. 52. if any fine, &c. be misapplied by any, he shall forfeit 5l. to him who informs thereof, to be levied by distress and sale, &c.

And the surveyor for neglect of duty by this act, shall forfeit 40s. to be levied and disposed *ut supra*.

If the defendant upon an indictment be fined, he shall not be thereby discharged, but a *distringas* goes *in infinitum*, till the way be repaired. R. 1 Sal. 358.

But where a contract is made for performance of that which the justices have ordered in the removal of filth, &c. the justices cannot compel a performance of the contract, but the order for it shall be void. R. Ray. 433.

So notwithstanding these statutes, a man may be amerced in a leet for not scouring a ditch in a highway. R. Ray. 250.

[By st. 13 Geo. 3. c. 78. s. 47. no fine, &c. for not repairing highway, and not appearing to indictment, shall be returned into exchequer, but paid to such person near the highway as court imposing fine shall direct, to be applied in repair; not accounting, to forfeit double. Fine imposed on parish, levied to one or more persons, special sessions may order assessment to reimburse, &c.

S. 53. And by st. 13 G. 3. c. 84. s. 39. persons damaging banks, bridges, posts, &c. forfeit, on conviction by one justice, by one witness, or view of justice, from 5l. to 10s. or be committed to hard labour, from one month to seven days.

[*]S. 54. Justices of corporations to act within their jurisdictions.

S. 65. On indictment or presentment, the court may order either party to pay costs.

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S. 66. If parish meeting agree to prosecute or defend, the surveyor may charge the expences agreed to at a meeting, or allowed by a justice, in his account.

S. 67. Notice of parish meeting must be given in church the Sunday preceding, and in writing fixed on the doors three days before the meeting.

S. 69. Surveyor is a competent witness in all cases.

S. 70. The terms in the schedule to be used with necessary variations only, and no objection taken for want of form ; and so, by 13 G. 3. c. 84. s. 72.

S. 72. Persons resisting execution of this act, rescuing distress, or constable not obeying warrant, forfeit from 10*l.* to 40*s.* or to be committed for three months, or till payment. So, by st. 13 G. 3. c. 84. s. 75.

S. 73. Penalties and forfeitures, and costs and charges, (not otherwise directed,) to be levied by distress, half to the informer, half to surveyor for repair ; if surveyor informer, all for repair : for want of distress, party to be committed for three months, or till payment. If offender lives in another jurisdiction, any justice where he lives, may, on copy of conviction or order proved on oath, grant distress, or commit as aforesaid. So, by 13 G. 3. c. 84. s. 76. 78.

S. 74. No person to be distrained till six days after he is served with the order. So, by st. 13 G. 3. c. 84. s. 77.

S. 75. Prosecutor, if the penalty is 40*s.* may proceed before a justice, or by action ; if he recovers shall have double costs. So, by st. 13 G. 3. c. 84. s. 79.

S. 76. Only one recovery for the same offence. Ten days notice of action ; action must be commenced in a month. So, by st. 13 G. 3. c. 84. s. 79.

S. 77. No conviction but on confession, oath of one witness, or view of justice in cases mentioned. An inhabitant is a competent witness ; so by st. 13 G. 3. c. 84. s. 74. and justice may act, though a creditor or trustee.

S. 78. Justice may administer oath to any person for better discovery and execution. By st. 13 G. 3. c. 84. s. 84. justice or trustee may administer oath.

S. 79, 80. Distress shall not be unlawful, nor the parties trespassers for want of form, nor the parties distraining trespassers *ab initio*, for subsequent irregularity : but party aggrieved may recover satisfaction for the special damage by action, but not if tender of amends is made before action brought ; if no tender, defendant may before issue joined, pay money into court. So, by st. 13 G. 3. c. 84. s. 80, 81.

S. 81. Any person aggrieved may appeal to any quarter-session, giving notice six days after cause of complaint, entering into recognizance in four days after notice, to try it, and abide order. Justice, on such notice, to return all proceedings to quarter session, under penalty of 5*l.* Quarter session to determine finally, and award costs to either party. Proceedings not to be quashed for want of form or removed by *certiorari*. No appeal from conviction, unless the party for [*]penalty or forfeiture shall at the time, if present, if not, in six days give notice, and enter into recognizance. So, by st. 13 G. 3. c. 14. s. 82, 83.

S. 82. Action for any thing done in pursuance of this act, must be prosecuted in three months, and in the county where fact committed ; defendant may plead general issue, and give act and special matter in evidence ; and, on verdict for him, nonsuit, &c. treble damages. So by st. 13 G. 3. c. 84. s. 85. and the action may be brought in the county where the defendant resides.]

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By st. 13 G. 3. c. 84. s. 33. if turnpike road is indicted, the court may proportion the fine between the inhabitants and the turnpike.

[S. 42, 43. Person destroying turnpike, or any part of it, or any bar, &c. erected to prevent passing without paying toll, or any weighing engine, or rescuing offenders, are guilty of felony, and may be transported for seven years, or imprisoned for three years, and may be tried in any adjacent county; and the damage shall be made good by the hundred; but if the offender is convicted in twelve months, they shall be repaid.

S. 47. Five trustees may direct indictments for nuisances at the expence of the turnpike; but not unless upon the confession of offender, or that a witness can be had.

S. 48. Information to favour offender is fraudulent, and a justice may proceed, as if there had been none.

S. 64. In action by or against trustee, the act or copy of order of his appointment, and evidence of his acting, shall be proof of his being trustee.

S. 73. Constable, &c. refusing or neglecting to execute, act, or to deliver a penalty, and surveyor, &c. neglecting for one week after the offence to inform, forfeit 10*l*.]

(C 14.) Justices of peace may inquire of a charity for repair of an highway.

By the st. 22 Car. 2. 12. justices of peace at sessions may inquire of the value of lands given for repair of the highway, and order improvement and employment according to the will of the donor, unless given to a college or hall of an university, which hath a visitor of its own.

[By st. 13 G. 3. c. 78. s. 52. justices in session may inquire of lands given to repair highways, and order improvement according to will of donor, if persons intrusted are faulty; except the lands are given to a college, &c. which has a visitor.] (y)

(D) PRIVATE WAY.

(D 1.) What shall be.

A private way is such as goes to a church, house, vill, or close; and is not common for all the king's subjects. Per Hale, 1 Vent. 189. Vide ante, (A 1.)

[*]So it may be from a meadow or close, to a street. 20. Ass. 18.

Or to an highway.

So it may be from one part of a close, across the ground of another, to another part of the same land. Mod. Ca. 3.

So it may be through or across the highway to such a close. R. Noy, 9.

But a man cannot have a way from one part of the land of another to another part. R. Mod. Ca. 3.

(D 2.) How claimed.—By prescription.

A private way may be claimed by prescription, reservation or grant, or for necessity. Mod. Ca. 3. { Vide White v. Crawford, 10 Mass. Rep. 183. }

(y) (C 15.) Of pleading a highway.

In pleading a highway, it is sufficient to state that it is such, without shewing the manner of its commencement, or that it has existed immemorially. 3 T. R. 265. Or the termini. 1 H. B. 351.—2. A plea claiming a public right of way over the *locus in quo* to B. is proved, though it appear that other places intervene. 1 H. B. 351.

[*57]

If a man prescribes for a way, which is now ploughed up by the plaintiff who assigned instead of it a new way, which hath been used *abinde*, it shall be a good excuse for using the new way. R. Per three J. Yel. 142. 1 Brownl. 212.

A man may prescribe for a way to a church, market, &c. through the close of another. Bro. Chimin, 2.

But it is not good, if he prescribes for a passage; for that does not import a way by land, but a way by water. R. Yel. 163. 1 Brownl. 216.

If he says, that the way is appendant or appurtenant; for it is not an interest but an easement. R. Yel. 159.

If he does not say *a quo termino ad quem* the way goes. R. Yel. 164. 1 Brownl. 6. 216. R. Mod. Ca. 3. Bro. Chimin, 6.

And that the way is for men, horses, or carriages. R. Yel. 164. 1 Brownl. 216.

For if he claims *viam equestrem et pedestrem* for carriages, without saying, and for carriages, it is not well. 3 Leo. 13.

If he says that the way goes from B. to a rectory; for the *terminus ad quem* is uncertain. R. 2 Leo. 10.

That it goes from B. to a close adjoining to a messuage in B. without saying in what parish the close was; for though the messuage was in B., perhaps the close adjoining was not. R. Lut. 1528.

That it goes *de quadam pecia terræ cont. 4. acras*; for *pecia terræ* is uncertain. R. after verdict. Lut. 124. (z)

So if he says, that he is seized of B. and has a way through the close of the plaintiff to the Thames; for he ought to say, that he has a way from B. through the close of the plaintiff to the Thames. R. Mod. Ca. 3.

But if he prescribes for a way from A. through a close in B. to the town of B. or to B. it will be well; for the town of B. shall be intended the place where the houses continue. R. Lut. 1508.

So if a lessee prescribes for a way, he ought to make a good title to himself from his lessor; and therefore, if he pleads a lease to him *habendum a die dat. ind prædict.* it shall be bad; for it was by indenture, it ought to be so pleaded. R. Lut. 1528.

But a man, who prescribes for a way through the close of B. need not say how many acres it contains. Bro. Chimin, 6.

[*](D 3.) By grant.

So a man may claim a way by grant; as if A. grants that B. shall have a way through such a close.

So if A. covenants that B. shall enjoy such a way, it amounts to a grant. R. 3 Lev. 305.

If a man seised of Black-acre and White-acre, uses a way through White-acre to Black-acre, afterwards grants Black-acre, with all ways, &c. this way through White-acre shall pass to the grantee. Mod. Ca. 3.

So if he seised of two acres to which a way is appurtenant, he grants one acre, with all ways, &c. the way shall be granted. Ibid.

So if a way be appurtenant to land, by a lease of the land, the way passes to the lessee, without an express grant. Per 3 J. 2 Cro. 190.

So if a way be of necessity, the grantee of the land shall have it without a grant of the way; as, if a man enfeoffs another of land, which was encom-

(s) So the description of a terminus as a highway generally, is semble, too general. 3 East, 4.

passed by his other land, the feoffee shall have a way over the other land, without any grant. R. 2 Cro. 170. R. Mod. Ca. 4. Willes, 71.

So if there be not another way convenient. R. 2 Cro. 170. 2 Rol. 60. l. 20.

[A. the owner of a close situate within a close belonging to B. had a prescriptive right of way through B.'s to his own; twenty-four years ago B. stopped up the old way, and made a new way, which was constantly used till B. stopped up the new way; in an action brought by B. against A. for going over the new way, it was holden that A. could not justify using this way as a way of necessity, but that he should either have gone over the old way, and thrown down the inclosure, or brought an action against B. for stopping up the old way. Willes, 232.

The new way was only a way by sufferance during the pleasure of both parties; and B. by stopping it up determined his pleasure. Ibid.]

But if a man bargains and sells lands with a way to it, the way does not pass: for the bargain and sale conveys only an use, and there cannot be an use of a way created *de novo*. R. 2 Cro. 190. (a)

(D 4.) For necessity.

So if a man has land, surrounded by the lands of another, he shall have a way through the land of the other, for the necessity. R. Mod. Ca. 3. Vide ante, (D 3.) [8 T. R. 50.] (b)

{ So where land of a debtor is extended, to which there is no way except over other land of the debtor, the sheriff and appraisers may let out to the creditor a right of way over such land, either separately, or jointly with the debtor. Taylor v. Townsend, 8 Mass. Rep. 411. }

So if a man has title to a wreck, he has a right to have a way over the land of another where the wreck lies, to take it, of necessity. R. Mod. Ca. 149.

A man, who uses navigation, has a right to a way over the land next the river where he navigates, if there be occasion. Mod. Ca. 163.

A way of necessity shall not be lost by unity of possession. R. Lut. 1489.

[*] But where a way is claimed for necessity, it will be a good plea, that the plaintiff has another way. R. Mod. Ca. 4.

Otherwise, where claimed by grant or prescription. Mod. Ca. 4.

(D 5.) How it shall be used.

If a man, upon a lease to A. for years, reserves a way to himself through the house of the lessee, to a back-house; he cannot use it but at seasonable times, and upon a request. D. 1 Vent. 48.

So, if a feoffor grants to a feoffee a way across his backside to a house and back again, he cannot use it to another place. R. 1 Rol. 391. l. 20.

So if he grants a way from D. to Black-acre, and the feoffee afterwards purchases lands adjoining to Black-acre; he cannot justify the using the way to those lands. R. 1 Rol. 391. l. 50. R. 1 Mod. 190. [1 T. R. 569.]

And therefore, in trespass if the defendant justifies for a way to Black-

(a) A demise, "with all ways appurtenant," passes, (c. s.) an occupation way, unless it be shewn that there are ways appurtenant. 3 Taunt. 24.

(b) 1. And an implied covenant for quiet enjoyment is included in the express covenant for quiet enjoyment. 3 Taunt. 24.—2. The line shall be that most convenient to the grantee; at least, if that was the one used by grantor. 3 Taunt. 24.

acre, the plaintiff in his replication may shew the special matter, that he uses the way to lands adjoining to Black-acre. 1 Rol. 391. l. 50. R. Lut. 113, 4.

But if the plaintiff replies, that the defendant used the way to Black-acre, and thence to the other lands, it is bad. R. 1 Rol. 391. l. 40.

But if A. has a way through the land of B., who ploughs up the soil where the way was used, and leaves another part of the same close for a way; A. may use the ancient track, and need not go where the way is assigned *de novo*. R. Noy. 128. (c)

(D 6.) By whom it shall be repaired.

The grantee of a way has power to amend it, as incident. Godb. 53. Semb. 1 Sand. 323.

But if a man grants a way through his close to another, the grantor is not bound to keep it in repair, if it be foundrous. 1 Sand. 322. [Dougl. 745.]

If a man be bound by prescription to the repair of a way, he need not keep it in better repair than it always was. Mod. Ca. 163. 1 Sal. 358.

But if it be impassable, a passenger may break the fence, and go *extra viam* as much as is necessary, to avoid the bad way. Jon. 296, 7.

(D 7.) Remedy for not repairing it.

If a common way to a church, vill, &c. be out of repair, he who ought to repair it may be indicted for it. Mod. Ca. 163.

And if he be convicted upon the indictment, the court will not set the fine till the justices of peace certify that it is well repaired. Mod. Ca. 163.

And if he be fined before the way be repaired, yet a *distringas in infinitum* shall afterwards go against the party till the sheriff certify, that the way is in good repair. Per Holt, Mod. Ca. 163.

[*](D 8.) Obstruction.

If a private way be obstructed, an action on the case lies. Vide Action upon the case, (A 2.)

If he, who has the way, has a freehold, and also he who has the land in which, &c. an assize lies. R. 3 Leo. 13.

And it is sufficient to say, *quod obstruxit*, or *obstupavit*, generally, without saying how, viz. by a ditch, fence, &c. R. 3 Leo. 13.

If a way be through the yard of another, who erects a gate to his yard, he who uses the way may justify the breaking of the gate so erected, through which he could not pass, without saying, that it was locked. R. upon Demurrer, 3 Lev. 92. (d)

(c) The line of the way may be confined by the grantor. 4 M. & S. 387.—2. And the grantee of the way when impassable, cannot go upon the land adjoining. 4 M. & S. 387.—3. The grantee of a road for coals, may make a framed waggon way, if necessary. 1 T. R. 560. Vide 2 N. R. 109.—4. In, through, and along, does not import "across" the line. 1 T. R. 560.—5. It seems, that a right of way, whether acquired by prescription, grant or reservation, is not lost by *non-user* or a tortious interruption of the use, for twenty years. *White v. Crawford*, 10 Mass. Rep. 183.—6. In a question whether a right of way has been lost, by *non-user*, it seems, that a recognition of the right is equivalent to an actual use of the way. *Ibid*.

(d) (D 9.) Extinction.

By purchasing the land or parcel thereof, the way is not extinct. 1 East, 381.—Nor is it by a co-equal existing right in the public. 8 East, 4,

CHIVALRY.

Vide COURTS, (E 1, &c.)—GUARDIAN, (A).—WASTE, (F 1.)

CHOSE IN ACTION.

Vide ASSIGNMENT, (C 1.)—GRANT, (D).

CHURCH.

Vide ADVOWSON.—DISMES, (E 1.)—ESGLISE, *per totum*.—PROHIBITION, (F 3.—G 2. 5.)—QUARE IMPEDIT, (A).

FREEHOLD OF THE CHURCH. Vide ESGLISE, (G 1.)

PARISH CHURCH. Vide ESGLISE, (C).

REPAIRS AND ORNAMENTS OF A CHURCH. Vide ESGLISE, (G 2.)—PROHIBITION, (G 2.)

SEATS IN A CHURCH. Vide ACTION UPON THE CASE FOR A DISTURBANCE, (A.—3.)—ESGLISE, (G 3.)

CHURCHWARDENS. Vide ESGLISE, (F 1, 2, 3.)

CHURCH-YARD. Vide CEMETERY, (A 1, &c.)—ESGLISE, (E).—PROHIBITION, (G 3.)

CINQUE PORTS.

Vide ABATEMENT, (D 3. 5.)—FRANCHISES, (E 1, &c.)

CIRCUITY OF ACTION.

Vide ACTION, (H.)

[*]CITIZEN.

Vide BURROUGH, (B 2.)—PARLIAMENT, (D 6.)

CITY.

Vide BURROUGH, (B 1.)—COURTS, (O 1, &c.—P 1, &c.)—PARLIAMENT, (D 12.)

CIVIL LAW.

Vide CANONS.

CLAIM.

(A 1.) CONTINUAL CLAIM. p. 61.

(A 2.) How it shall be made. p. 61.

(A 3.) By whom. p. 62.

(A 4.) At what time. p. 62.

(B) CLAIM TO AVOID A FINE.

(B 1.) How it may be made. p. 63.

(B 2.) By whom. p. 64.

(B 3.) At what time. p. 64.

(A 1.) CONTINUAL CLAIM.

If a disseisee, or any one who has title to enter into the possession of another, makes continual claim, his entry shall not be taken away by a descent afterwards from the disseisor, or other tenant of the land. Co. L. 250.

So, the dying seized of the feoffee, or other who has title, as well as of the disseisor, and a descent to his heir, does not take away the entry of him who makes continual claim. Co. L. 251. a.

Continual claim is of the same effect as an entry; and the continuance in possession of the disseisor is a new disseisin *toties quoties*. Lit. S. 429, 430.

And if he in possession had only an estate-tail before, he has now a fee-simple by disseisin. Lit. S. 429.

(A 2.) How it shall be made.

A man who makes continual claim to prevent a descent, ought to go to the land or parcel of it, if he dare. Lit. S. 421.

And make his claim upon the land. R. Mod. Ca. 44.

[*]And if he dare not, for fear of death, battery, or mayhem, he ought to go as near to the land as he dare, to make his claim. Lit. S. 421.

Or for fear of imprisonment. Co. L. 253. b.

(A 3.) By whom.

Continual claim ought to be made by him who has title to enter. Lit. S. 416. Vide Forfeiture, (A 6, 7.)—Vide post, (B 2.)—Vide Condition, (G 1.)

And therefore, if tenant for life, remainder in fee, be disseised, claim ought to be made by him in remainder. Ibid.

If he has right of entry, though he has no title to the profits immediately, he may make continual claim; as, if lessee for years, or tenant by statute merchant, staple, &c. be ousted, and the reversioner disseised, he in reversion may make continual claim, though he is not entitled to the present profits. Co. L. 250. b.

So, continual claim by tenant for life is sufficient for him in reversion or remainder. Lit. S. 416.

If continual claim be made by A. and then the disseisor or his feoffee dies seized, and the land descends, and then A. dies; his heir, upon this claim, may enter. Co. Lit. 250. b.

So, if a person who has right of entry commands his servant to make claim, and the servant comes to the land, and makes the claim, it is sufficient. Lit. S. 433.

So, if the master dare not go nearer the land than D. and commands his

servant to go to D. and make claim, and the servant does, it is sufficient. *Ibid.*

So, if a recluse, a man languishing or decrepid, commands his servant to make claim, and the servant goes as near as he dare, for fear of death, &c. and makes claim, it is sufficient. Lit. S. 434.

Otherwise, if the master was of good health; for he did not do all that his master dared do. Lit. S. 435.

(A 4.) At what time.

By the common law continual claim did not avail, unless it was within a year and a day inclusive before the dying seised. Co. L. 255. Vide post, (B 3.)

But it was sufficient if claim was once made within the year and day before the dying seised, though the disseisor had possession for twenty or forty years after the disseisin. Lit. S. 427.

And though after the claim made, the disseisor enfeoffed a stranger, who died seised within the year and day, but before any new claim. Lit. S. 425.

Yet by the st. 32 H. 8. 33. if a disseisor dies seised within five years after the disseisin, the entry of him who has right is not taken away, though he did not make continual claim.

But if he survives the five years, continual claim ought to be made, as at common law. Co. L. 256. a.

When a descent shall toll an entry, unless it be avoided by continual claim. Vide in Descent, (D 1, &c.)

What shall be a disclaimer, and the effect of it. Vide Disclaimer, (A—B.)

[*](B) CLAIM TO AVOID A FINE.

(B 1.) How it may be made.

By the common law, a fine might be avoided by the entry of his claim upon record under the foot of the fine (which is now taken away) by a *præcipe quod reddat*, brought of the land, by entry or continual claim. 2 Inst. 518. 2 Leo. 53. Pl. Com. 358. b.

But by the st. 4 H. 7. it must be by lawful action or entry.

And, therefore, a man may avoid a fine by an action commenced within five years after his right accrues.

And it is sufficient, that the action be commenced within time, though he has not judgment or execution till seven years or after. Pl. Com. 358. b.

So a man may avoid a fine by actual entry, where his entry is not taken away.

By a claim to be heir, at the gate; if at the same time he enters upon the land or house, though he does not make his claim there. Skin. 412.

So, by his claim among his neighbours, as near the land as he can, when he dare not enter, and his entry was congeable. Pl. Com. 358. b. Vide ante, (A 2.)

But if an action was commenced, and afterwards discontinued, that does not amount to a claim to avoid a fine. D. 1 Vent. 45. R. Dal. 107.

Nor an entry of his claim upon record *sub pede finis*. R. 4 Lev. 104.

So, the delivery of a declaration in ejectment does not amount to an

entry. R. 1 Sand. 319. 1 Mod. 10. 1 Vent. 42. 3 Burr. 1897. Doug. 485. Willes, 177.

Though the defendant afterwards appears upon it, and confesses lease, entry, and ouster. R. 1 Sand. 319. 1 Vent. 42.

[There must be an actual entry to avoid a fine; and if the demise is laid before the time of that entry, an ejectment cannot be maintained. By all the judges in parliament. Str. 1086. Andr. 125. 7 T. R. 433. 7 T. R. 727. Vide Estates, (B 15.)

But if the actual entry is before the fine, and the demise laid after entry and before the fine, it is good, though the ejectment was brought after the fine. 1 Wils. 214.]

So, a bill in chancery is not sufficient to avoid a fine. Dal. 116. [2 Blk. 993.]

So, on entry by *cestuy que trust*, without a subpoena, is not sufficient to avoid a fine, as to the trust. Ca. Ch. 268. 278. (e)

And no claim or other act can be sufficient to avoid a fine, as to a trust, but a subpoena. Ca. Ch. 278. 2 Ca. Ch. 126.

So, an entry is not sufficient to avoid it, where the fine makes a discontinuance; for it ought to be by action. 1 Ver. 213.

[*]So, by the st. 4 & 5 Ann. 16. [s. 16.] no claim, or entry, of or upon any lands, &c. shall be of force to avoid any fine levied, or to be levied, with proclamations in C. B., county palatine, or grand sessions of Wales, unless upon such entry, or claim, an action shall be commenced within one year after, and prosecuted with effect.

[Actual entry is not necessary to avoid a fine, without proclamations. 2 Wils. 45.]

So an entry into land not comprized in the fine, claiming that which was comprized, is not sufficient. Hard. 400.

Nor is an entry in the land in one county, claiming land in another, sufficient for the land in the other county. Hard. 401. (f)

Nor a claim at a gate in the street, without entry upon the house or land. Skin. 412.

Chancery will not supply a defect in an entry to avoid a fine. Ca. Ch. 278.

(B 2.) By whom.

A claim to avoid a fine may be made by him who has a present right. Pl. Com. 359. a. Vide ante, (A 3.)—Condition, (G 1.)

So, if a stranger, of his own head, enters to avoid a fine, and he who has the right assents afterwards within five years, it is sufficient. Co. Lit. 245. a.

So, if one avoids a fine by entry or claim, it shall be avoided as to all others. Pl. Com. 358. b.

But an entry by a stranger to avoid a fine, without the assent of the party. precedent, or subsequent, is not sufficient. Co. L. 245. a. R. 9 Co. 106. a. R. Cro. El. 561.

(e) On a fine with proclamations being levied, if there be several remainder-men, they will respectively, from the operation of the stat. 4 Hen. 7. c. 24. be entitled to their respective rights of entry within five years after their respective titles accrue, without a subsequent remainder-man being prejudiced by the laches of another remainder-man who preceded him. 8 East, 552. 1 Taunt. 578.

(f) An entry upon an estate generally, is an entry for the whole; therefore, if for less be intended, it should be so defined at the time. 3 T. R. 162.

[*64]

So, an entry by a stranger, for a condition broken, does not avail without an express assent. R. 2 Cro. 57. (g)

So, an entry by him in a remote reversion, or remainder does not avail; for it ought to be by him who had the present right. Pl. Com. 359. a. (h)

(B 3.) At what time.

An entry, action, or claim to avoid a fine, by the common law, ought to be made within a year and a day. Pl. Com. 357, 358.

But by the st. *de donis*, 13 Ed. 1 the issue in tail, or he in reversion, *necesse non habet opponere clameum*; for, as to him, the fine *ipso jure est nullus*.

Yet the fine of tenant in tail makes discontinuance, which ought to be avoided by formedon by the issue, or him in remainder or reversion.

So an infant, a man of non-sane memory, in prison, or out of the realm, was not bound to make claim within the year and day. Pl. Com. 359. b.

And not being bound to make claim, a non-claim, by the common law, does not prejudice them for ever. Pl. Com. 860. a.

So, if a man of full age, &c. who ought to make claim, dies within [*]the year; his heir within age, &c. was exempted for ever. Pl. Com. 360. cont. ibidem, 371, 2.

So by the st. 34 Ed. 3. 16. non-claim was ousted as to all persons. (i)

For more of title Claim, vide condition, (O 5.) — Fine, (K 1, 2.) — Forfeiture, (A 4.) — Franchises, (A 1, 2.) — Officer, (E 6.) — Release, (E 2.)

CLERGY.

Vide APPEAL, (G 9.) — JUSTICES, (Y 1, &c.)

CLERK.

SIX CLERKS. Vide CHANCERY, (B 7.)

COUNTY CLERK. Vide VISCOUNT, (B 2.) — COUNTY.

CLERK OF THE MARKET. Vide MARKET, (H).

———— PEACE. Vide JUSTICES OF PEACE, (D 5.)

———— PIPE. Vide COURTS. (D 13.)

IGNORANCE OR MISPRISION OF THE CLERK. Vide AMENDMENT, (D 1. 9. — E 1, 2. — G 2. — H 3. — T 1, &c. — Vil, &c.) and many other places in the same title. . .

CODICIL.

Vide DEMISE, (D 3.)

COIN AND COINAGE.

Vide JUSTICES, (K 7.) — MONEY, *per totum*. — PREROGATIVE, (D 39.)

(g) Nor can a right of entry be reserved to a stranger. 4 Taunt. 23.

(h) The entry of a *cestui que use* will avoid the statute of limitations. Ld. Rd. 716.

(i) 1. Admitting that a right of entry is devisable, the right must be enforced by the devisee within the period allotted by law to the devisor. 1 Taunt. 578.—2. Adverse possession of land for twenty years, bars an entry by the owner, as well of an incorporeal right therein as of the soil itself. 2 Taunt. 156. Id. 160.

COLLEGE. (k)

[*]COLLOQUIUM.

Vide ACTION UPON THE CASE FOR DEFAMATION; (G 7, 8, &c.)

COLLUSION.

Vide COVIN.

COLOUR.

Vide PLEADER, (3 M 40, 41.)

COMMAND.

COMMAND OF FORCES. Vide PREROGATIVE, (C 3.)

COMMENCEMENT.

COMMENCEMENT OF A LEASE. Vide ESTATES, (G 8, 9.)

————— PARLIAMENT. Vide PARLIAMENT, (E 1.)

————— TERMS. Vide TEMPS, (C 1, &c.)

COMMENDAM.

Vide PREROGATIVE, (D 18, &c.)

COMMISSION AND COMMISSIONERS.

COMMISSION TO TAKE AN ANSWER. Vide CHANCERY, (K 3.)

————— OF ARRAY. Vide WAR, (B 3.)

————— TO ASCERTAIN BOUNDARIES.

————— AND COMMISSIONERS OF BANKRUPTCY. Vide BANKRUPT, (D 1, &c.)

————— FOR EXAMINATION OF WITNESSES. Vide CHANCERY, (P 2, &c.)

COMMISSIONERS OF THE GREAT SEAL. Vide CHANCERY, (B 1.)

COMMISSION OF JUSTICES. Vide JUSTICES, (C 2. G 1.) — PREROGATIVE, (D 29.)

————— OF PARTITION. Vide PARCENER, (C 10.)

(k) 1. A college is a lay corporation of the same nature with an hospital. Ld. Rd. 6. 8.—
2. The estates and property of a college are in general vested in the corporate body. Semb.
Ld. Rd. 9.—3. A college is wholly subject to the ordinances the founder appoints, and the
visitor he ordains. D. Ld. Rd. 8.—4. If a college do not exceed their jurisdiction, the
king's courts have no cognizance. Cowp. 322.—5. Master and fellow's disputes concern-
ing elections to be tried in the king's college. Loft. 25.—6. Sentence of expulsion unap-
pealed from, is conclusive against the party, in a collateral proceeding. Cowp. 315.—7.
The head of a college cannot maintain an assize for his office of headship, not having therein
an estate competent to that; the whole college have an interest in the estate. 2 T. R. 355.
—8. Independent members of a college are mere boarders, and have no corporate rights,
nor can they appeal to the visitor. Cowp. 319.—9. A will which devises an advowson to a
college in the university, is good. 2 Blk. 1182.

COMMISSION OF THE PEACE. Vide JUSTICES OF PEACE, (A 6, &c.)
— OF REBELLION. Vide CHANCERY, (D 5.)
— FOR REVIEW. Vide PREROGATIVE, (D 16.)
['] — AND COMMISSIONERS OF SEWERS. Vide SEWERS.
— FOR VISITATION. Vide VISITOR, (A 3.)
— AND COMMISSIONERS OF CHARITABLE USES. Vide USES, (N 14, &c.)

COMMITTEE.

Vide PARLIAMENT, (E 6, &c.)

COMMON.

- (A) COMMON. p. 67.
- (B) APPENDANT. p. 68.
- (C) APPURTENANT. p. 69.
- (D) IN GROSS. p. 70.
- (E) PER CAUSE DE VICINAGE. p. 71.
- (F) COMMON ; HOW IT SHALL BE USED.
 - (F 1.) When it excludes the owner. p. 72.
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- (G) WHEN ONE MAY IMPROVE IT. p. 74.
- (H) WHAT INTEREST THE COMMONER HAS. p. 78.
- (I) WHAT REMEDY THE COMMONER SHALL HAVE.
 - An assize, &c. p. 80.
- (K) WHAT REMEDY THE LORD SHALL HAVE. p. 81.
- (L) HOW COMMON SHALL BE EXTINGUISHED. p. 82.
- (M) HOW SUSPENDED. p. 83.
- (N) WHEN IT IS NOT DESTROYED. p. 83.
- (O) WHEN REVIVED BY A NEW GRANT. p. 83.

(A) COMMON.

Common imports a privilege to take a profit in common with many. Co. L. 122. a.

And a man may have common of pasture, turbary, or piscary. F. N. B. 180. L.

[*] So, common of estovers in a wood, minerals, &c. Co. L. 122. a.

Common is incident to the land to which it is appendant ; and though

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it is to be taken in another parish, it shall be charged, &c. where the land lies. 1 Sal. 169.

[Lands which are stinted for five months, and open for seven, and enjoyed with the other common, is part of the waste and common of the manor, and is included in a reservation of the waste, and all mines in it. 2 Atkins, 182.] (1)

(B) APPENDANT.

There are four kinds of common of pasture; appendant, appurtenant, common in gross, and common *pur cause de vicinage*. Co. L. 122. a.

Common appendant ought to be time whereof, &c. 1 Rol. 396. l. 40.

For it cannot begin at this day. 1 Rol. 396. l. 42. 26 H. 8. 4. a.

Common appendant is of common right. 1 Rol. 396. l. 44.

For if man had enfeoffed others, before the statute of *quia emptores terrarum*, of lands, parcel of his manor, the feoffees should have common, for their commonable cattle, within the wastes. &c. of the lord, as incident to their feoffment. 2 Inst. 85, 6. Per 2 J. 1 Rol. 396. l. 45. 4 Co. 37.

Common appendant shall be for the whole year.

Or, for a time limited; as for the whole year, except when the lord depastures his cattle. 1 Rol. 396. l. 49.

For the whole time after severance, until the land be sown again. 1 Rol. 397. l. 8.

And in such case, if only part be sown again, the common continues in the residue.

For the time after the hay removed, till Candlemas. 1 Rol. 397. l. 10.

From such a day to such a day. 1 Rol. 397. l. 12.

As long as he inhabits such a house, or pays so much. 1 Rol. 397. l. 5.

For the time after severance, till the re-sowing every two years, and for the whole year every third year. 1 Rol. 397. l. 19.

Until the re-sowing with the assent of the commoners. R. 1 Leo. 73.

Common shall be appendant to arable land, not to a house. 1 Rol. 397. l. 28, 29.

Nor to a meadow, &c. nor any other than arable land. 26 H. 8. 4. a. 4 Co. 37. b. 1 Rol. 397. l. 29. Willes, 227.

Vide Appendant and Appurtenant, (B 3.)

Nor to lands improved out of the waste, within time of memory. 1 Rol. 397. l. 31.

Yet if a man prescribes for common appendant to a house, cottage, [*]&c. it will be well, for it has a curtilage, &c. R. 1 Sal. 169. R. 2 Jon. 227.

And it may be appendant to a manor, carue of land, &c. which comprehend a house, meadow, &c. but it shall be intended appendant only to the arable in it. R. 4 Co. 37. b.

So, if the arable be converted to pasture, the common remains. 4 Co. 37.

Common appendant shall be only for beasts of the plough, which till the land, as horses, oxen, &c.; or for cattle which compost the land, as cows and sheep. 1 Rol. 397. l. 38. 4 Co. 37. a.

And therefore, if a man prescribes for common appendant for all cattle,

(1) A claim of common in a field *a tempore fractionis campi*, is bad even after a verdict establishing the claim, on account of the uncertainty of the word "*fractionis*." Ld. R. 645.

it will be bad ; for that extends to swine, goats, geese, &c. 1 Rol. 397. l. 43.

But, regularly, the cattle for which common appendant is claimed, ought to be levant and couchant upon the tenements to which, &c. 1 Rol. 398. l. 1. [Willes, 227.]

[Therefore common appendant can be claimed only for so many cattle as are necessary to plough and manure the tenant's arable land. Ibid.]

Yet a man may claim common appendant for a certain number of cattle. 1 Rol. 398. l. 7.

[In a justification under a right of common, the cattle must be commonable, his own, and levant and couchant. 1 Bur. 320.]

(C) APPURTENANT.

Common appurtenant originally began by express grant.

And a man must prescribe for it. Co. L. 122. a.

Or it may begin within time of memory. Cro. Car. 482. 26 H. 8. 4. a.

As, if a man claims common for all cattle, it is common appurtenant: for it includes swine, goats, geese, &c. 1 Rol. 397. l. 44. Vide infra. (m)

If he prescribes, that he, and all those whose estate he has in such a house, have common in such a place for two beasts. 1 Rol. 399. l. 39.

That all the inhabitants in an ancient messuage in such a vill have common in such a place ; but it cannot extend to habitations erected *de novo*. R. Sav. 81.

If a man by bargain and sale sells B. to another, and afterwards grants common to the bargainee for all cattle which manure B., and afterwards the deed is inrolled ; the bargainee shall have common as appurtenant to B. though his estate in it was not perfect at the time of the grant. R. 1 Rol. 400. l. 7.

Though the grant had no reference to the bargain and sale. Ibid.

So, if he grants common for cattle levant and couchant upon land, which he shall purchase within a month. R. 1 Rol. 400. l. 19.

Or, for cattle levant and couchant upon B. and he afterwards purchases it. Dub. 1 Rol. 400. l. 27.

[*]If a man grants common to another within his manor or lands of D., it is good, though it does not appear that there is any waste there ; for it is granted generally, within his lands of D. R. upon a special demurrer, Cro. Car. 599.

So, if he prescribes for pasturage in a meadow for two horses till the hay be moved, it is good. R. 2 Cro. 27.

A man may prescribe for common, as appurtenant to his manor, or freehold, for all cattle. 1 Rol. 401. l. 8.

Or, for hogs levant and couchant. 1 Rol. 401. l. 29.

Or, for a certain number of cattle, as 300 sheep, &c. without saying levant and couchant. 1 Rol. 401. l. 15. 2 Cro. 27. R. 2 Mod. 185.

So, for cattle levant and couchant upon a messuage *cum pertinentiis* ; for this comprehends a curtilage of an acre or more, upon which they may be couchant. R. 2 Jon. 227. 1 Lord Raym. 726. (n)

(m) Common appurtenant may be created at this day. 15 East, 108.

(n) 1. Common for cattle levant and couchant, cannot be appurtenant to a house without land to maintain them. 5 T. R. 46. 2 Wils. 258.—2. There is no such thing as com-

So, the lord may claim pasturage for two horses in 1000 acres of meadow till it be cut for hay ; for so large a quantity cannot be much prejudiced by only two horses. R. 2 Cro. 27.

[Common of pasture, without land, may be parcel of a manor, though demised and demiseable by copy of court roll ; and if it be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to levancy and couchancy, and be not claimed as incident to arable land, it will be taken to be common appurtenant. Willes, 319.]

(D) IN GROSS.

Common in gross is such as is not appendant or appurtenant to any certain land. Co. L. 122. a.

And ought to be claimed by prescription, or by deed. Ibid.

As if a man who has common appurtenant for a certain number of cattle, grants it over to another, it shall be common in gross. R. 1 Rol. 402. l. 10. Cro. Car. 433. 2 Lev. 67.

So, if a man grants common to another for his cattle, *ubicunque* the cattle of the grantor go, it will be common in gross.

And if he doth not restrain the cattle of the grantee to any certain number, it is a common in gross *sans nombre*.

• So, if he grants common *quandocunque averia sua ierint*. Cro. Car. 599.

So, common for the inhabitants of antient messuages in such a town. 2 Leo. 44.

So, common to the mayor and burgesses of such a town. R. 2 Lev. 246. (o)

Yet common in gross *sans nombre* is not good, if there be not some restraint or limitation: as, if a corporation prescribes for all of the [*]corporation, for all their cattle commonable, without saying, levant and couchant within the same town, it is ill. R. 1 Sand. 346. but Sand. not satisfied. 1 Mod. 6. R. Jon. 298. (p)

If A. claims common *sans nombre*, he ought to say levant and couchant upon such land. R. 2 Mod. 135.

But common appendant never can become common in gross. 1 Rol. 401. l. 52.

Nor common appurtenant for cattle levant and couchant upon such tenements. 1 Rol. 402. l. 2. Per Hale, 2 Lev. 67. (q)

And, if common appurtenant be granted with a parcel of lands to which, &c. it shall be appurtenant to such parcel. R. 1 Rol. 402. l. 15. Cro. Car. 432.

[A man cannot prescribe for common appurtenant to a farm ; because it is uncertain of what a farm consists, perhaps of 10 acres, or of 100 ; but the prescription ought to be laid to a messuage, and so many acres of land. 1 Ld. Raym. 726.]

If a man prescribe for common for a certain number of cattle, as appurtenant, &c. it is not necessary nor material to shew that they are levant and

mon without stint belonging to land. 2 Wils. 269.—3. So a right of common without stint, as annexed to a messuage without land, cannot exist. T. R. 396.

(o) The going of so many head of cattle in a certain common, in a common in gross. 7 T. R. 671.

(p) 1. A grant of common in gross without number, is good. Ld. Rd. 405.—2 But the right to such common is not transferrable. Ld. Rd. 407.

(q) Yet common appurtenant, without levancy and couchancy, is convertible for a time to common in gross. 5 Taunt. 244.

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couchant ; because it is no prejudice to the owner of the soil, for that the number is ascertained. Id. ib.]

(E) PUR CAUSE DE VICINAGE.

Common *pur cause de vicinage* is, when two or more towns have common in the fields within their towns, which are open to the fields of the neighbouring towns, and the cattle, put to use their common there, escape into the fields of the neighbouring towns, *et e contra*. 4 Co. 38. b.

And therefore, this common is but an excuse for a trespass. Co. L. 122. a. 4 Co. 38. b.

So, where several persons have lands intermixt in an open field, and put their cattle at shack, viz. at large, to depasture there, which cannot be without trespassing the one upon the other ; this is in the nature of common *pur cause de vicinage*. 7 Co. 5. a.

And if any one incloses, and after the inclosure the others have used after harvest to open his gates, and to intercommon there, the usage determines the right, and the owner who inclosed cannot exclude the others. 7 Co. 5. Vide infra.

Though he refuses to intercommon with them. 7 Co. 5.

When there is common *pur cause de vicinage*, one commoner cannot put his cattle into the lands of another vill, or manor, &c. but into his own lands only, and they must escape into the other. Co. L. 122. a. 4 Co. 38. b.

And if one vill or manor has 100 acres, and the other only 50, the latter can use the common only with cattle proportionable to the 50 acres. 7 Co. 5. b.

[*]And he can use it only for cattle levant and couchant within his tene-ment or vill ; for it is in the nature of a common appendant.

And therefore it ought to be claimed from time whereof, &c. as common appendant, though it be not so. Per Wray, 4 Co. 38. a.

If common be allowed *pur cause de vicinage*, the one lord of the manor or vill may inclose, and oust the others of common there. Co. L. 122. a. R. 4 Co. 38. b. (r)

So, if the owner of land, where there is shack, incloses, he shall hold in severalty, where by usage the inclosers there have done so. 7 Co. 5. b.

If several freeholders, who have lands in a common field, intercommon, one of them cannot prescribe to inclose against the others. Adm. 2 Mod. 105. Vide supra.

(F) COMMON ; HOW IT SHALL BE USED.

(F 1.) When it excludes the owner.

If tenants of a manor have common in the wastes, they cannot exclude the lord ; for he by common right may put in his cattle. Co. L. 122. a. 1 Rol. 396. l. 10.

So, a grantee of common cannot exclude the owner. 1 Rol. 396. l. 13. 399. l. 2.

Though the grantee has common *sans nombre*. 1 Rol. 396. l. 13. Co. L. 122. a.

Nor tenants, who claim common of estovers. 2 Cro. 256, 7.

(r) Common by vicinage is not excluded without a complete separation, though the only communication left open is a highway leading from one common to the other. 13 East, 348.

And they cannot prescribe to exclude the owner of the soil; for the word common imports it. Co. L. 122. a. 2 Rol. 267. l. 30.

If the owner of the soil aliens, saving his common, he may afterwards depasture there. 1 Rol. 396. l. 25.

And if there was not any saving, the alienee shall have common. 1 Rol. 396. l. 30.

But the lord or owner of the soil, by custom, may be restrained to two or three beasts. Cont. 2 Rol. 267. l. 26. R. Yel. 129.

Or, he may be restrained to a certain time.

[The right of commoners in a common may be subservient to the right of the lord in the soil: so that the lord may dig clay pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord. 5 T. R. 411.]

So the tenants of a manor may prescribe, that after the grass is mowed and put in cocks, the lord only shall put in his cattle till Michaelmas, and then the tenants only till Lady-day. Per Brampton, 2 Rol. 267. l. 10.

So, a man may prescribe, or allege a custom, to have the sole or several *vesturam terræ*, or *pasturam terræ*, and exclude the owner of the soil. Co. L. 122. a.

[*]So, the copyholders of a manor may allege a custom to have the sole pasturage in such a place, and to exclude their lord: for such usage may have had a good commencement. R. 2 Sand. 326. 2 Lev. 2. Pol. 13. 1 Mod. 74.

So, the freeholders may prescribe, that they, with the customary tenants, and the copyholders may allege a custom, that they, with the freeholders, have the sole pasturage. Semb. 1 Sand. 352. Dub. 3 Mod. 250.

So a tenant may prescribe to have all thorns, &c. growing upon such a place; by which the owner shall be excluded. R. 2 Cro. 256, 7.

[But a prescription that occupiers, or inhabitants ought to have common is not good. 1 Lord Raym. 405.

By st. 13 G. 3. c. 81. arable in common fields shall be ordered as three-fourths in number and value of occupiers direct for six years. Cottager or commoner without land is not excluded his full right, unless he consents in writing for an annual payment. If occupiers agree not to depasture in common, and allot what shall be such common for cottagers only, as shall be deemed an equivalent by a majority of them who have not compounded, they shall not have common on the other part. Person having separate sheep-walk, or pasture for cattle, not excluded from his right, unless he consents.

Balks, &c. may be ploughed with consent of lord of manor, and three-fourths of occupiers, except where it is a road. Boundary stones shall be erected.

Lords and three-fourths of commoners may let one twelfth-part of wastes for four years, the rents to be employed in improving the residue.

Or assessment may be levied for improving stinted commons, as lord and majority of occupiers direct.

Majority, with lord's consent, may postpone opening commons, stinted as to time, for twenty-one days.

Two-thirds of commoners, with lord's consent, may open and shut common pastures, but a portion shall be reserved for those dissenting.

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Stinted right of common for horses, &c. may, by majority of commoners, be commuted for sheep.

Persons otherwise disabled may agree under this act.

Tithe owners shall receive no gratuity for tithes, but by half-yearly or yearly payments.

The consent of occupiers is not valid, without an authority from proprietor.]

(F 2.) With what cattle.

Common appendant, or appurtenant for cattle levant and couchant, may be used with cattle which he hires or borrows to plough, or manure his land: for they are his cattle. 1 Rol. 402. l. 39. 401. l. 39.

And which yield nurture for his family. 1 Rol. 401. l. 43.

So with rabbits, or other beasts of warren, as well as other cattle. R. Lut. 108.

Common in a forest may be used with sheep. Lut. 81. Vide in Chase, (O 3, 4.)

[*] Though it be in the fence-month. Lut. 81. If he prescribes for it. Pol. 447.

Rams must not remain on commons from the 25th of August to the 25th of November. 13 G. 3. c. 81. s. 21.

But he who has common appendant, or appurtenant for cattle levant and couchant, cannot use the common with the cattle of a stranger. 1 Rol. 402. l. 34. 2 Sand. 327. Semb. Lut. 107.

Nor can he license his tenants at will to put their cattle there. 1 Rol. 402. l. 36.

Nor can he use the common with cattle which he agists. 1 Rol. 402. l. 34.

Or, which he has to sell. 1 Rol. 401. l. 46.

Nor can he grant over his common to another; for it is for cattle levant. R. 2 Cro. 15.

So, he who has common in gross *sans nombre*, cannot license a stranger to put cattle there. 2 Sand. 327.

Yet he who has common [in gross] for a certain number of cattle may put in the cattle of a stranger. 1 Rol. 402. l. 43. Cont. l. 34. Dub. 2 Cro. 575. (s)

So, he who has the sole pasture may license a stranger to put his cattle there. R. 2 Sand. 327. 2 Lev. 2. Pol. 13. 1 Mod. 74.

And a license *pro hac vice* may be by parol. 2 Lev. 2. Cont. semb. 2 Sand. 328.

So he may use it for cattle not levant and couchant. R. 2 Lev. 2.

Yet after a verdict a license shall be intended by deed, though not pleaded. R. 2 Sand. 328.

(G) WHEN ONE MAY IMPROVE IT.

The lord could not improve the land where others have common by the common law, 2 Inst. 85.; viz. against others who have common by grant; but against his tenants it was otherwise. 2 Inst. 474. 1 Rol. 365. (t)

(s) Or cattle of his own not levant et couchant. Ld. Rd. 726.

(t) 1. The right of approving in the lord of a manor against common appendant, is a common law right. Semb. 2 T. R. 392. 1 Taunt. 435.—2. A custom in a manor, that any person under certain restrictions, and with the lord's consent, may inclose parcels of the

But now, by the st. of Merton, 20 H. 3. 4. the lord may improve, leaving sufficient pasture, ingress, and egress for his tenants.

And by the st. W. 2. 13 Ed. 1. 46. the st. of Merton, which extends to the lord and his tenants; shall hold between the lord and others who have common.

And therefore, the lord may improve his wastes against those who have common appendant, or appurtenant for cattle levant and couchant upon their tenements.

[*]So if the lord has common in the lands of the tenant, the tenant may improve. 2 Inst. 474.

[So any person who is seised in fee of part of a waste within a manor, may approve, leaving a sufficiency of common, though he is not the lord of the manor. 3 T. R. 445.]

So if the lord aliens the soil, where the common was taken, the alienee may improve. 2 Inst. 87. (u)

The lord may improve *toties quoties*, if there be sufficient common left for his tenants. Ibid.

And if it be sufficient at the time of the improvement, though it afterwards appears to be insufficient, the improvement stands. 2 Inst. 87.

If the lord makes a feoffment of part of the waste, the feoffee may inclose; for the feoffment is an improvement. Ibid.

By the st. W. 2. 46. none shall be aggrieved by an assize of common of pasture, by reason of windmill, berkery, (viz. sheep or tan-house,) cow-house, necessary augmentation of his court-yard or curtilage. 2 Inst. 476.

And for these improvements the lord, &c. shall not be aggrieved, though sufficient common be not left. 2 Inst. 476. Dub. 1 Lev. 62.

And these instances are only for example; for the statute extends by equity, where the lord builds an habitation for his beast-keeper. 2 Inst. 476.

Where he builds a new house for his own habitation, and enlarges the curtilage. Semb. 1 Lev. 62. 1 Sid. 79.

But he ought to say, that it was for his habitation, and that it was necessary. R. 1 Lev. 62. 1 Sid. 79.

If the lord improves and incloses, and the fences are thrown down by persons unknown, by the st. W. 2. 46. the towns adjacent, if they do not indict the misdoers, shall be distrained to repair the same fences. 2 Inst. 476.

If they be thrown down by night or by day, if the persons be not known. Lut. 157.

And this if the misdoers are not indicted within a year and a day. 2

waste, is not restrictive of the lord's common law right to approve. 2 T. R. 391.—3. The lord of a manor is not precluded inclosing against common of pasture, by the tenant's having another and distinct right of common against which he cannot inclose; such as common of turbary, a right to dig sand, and the like. 6 T. R. 741. 2 T. R. 391.—4. But he cannot, under the stat. of Merton (20 Hen. 3. c. 4.), inclose and approve, where there is a right in the tenants to estovers, or to dig gravel. 2 T. R. 391. 6 T. R. 741.—5. Nor does the stat. empower the lord to approve against common of turbary. 1 Taunt. 435.

(u) 1. If the lord of a manor alien the waste, the alienee may approve. 3 T. R. 445.—2. And the owner of the soil may approve in a waste, which neither is nor ever was parcel of a manor. Semb. 3 T. R. 448, 449. { The grantee in fee, of a right of common, in gross, may alien it, and it will descend to his heirs; but it cannot be enjoyed by several alienees, severally; and where it descends to several, as tenants in common, &c. it seems, that it cannot be divided among them, but there must be a joint enjoyment of it: Nor can one of the tenants aliene his right in the common, though they may jointly aliene it. *Leyman v. Abeel*, 16 Johns. Rep. 30. }

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Inst. 476. Lut. 158. 1 Rol. 365. Dict. that a *distringas* lies if the misdoers are not indicted within a convenient time, though the year be not passed. Cro. Car. 440.

And therefore a writ shall go to the sheriff to inquire what malefactors threw down the fences; and if he returns that it was by persons unknown, a *distringas* goes against the inhabitants of the next towns, and to inquire of the damages. Lut. 141. 170. Cro. Car. 280. 440.

But a *distringas* does not go for cutting down trees, if the fences are not thrown down. R. Ray. 487.

The writ need not shew a title to improve. R. Cro. Car. 280.

And it lies for the owner of the waste. Sho. 106.

For the grantee of the common. Sho. 106.

[The proceedings upon a *noctanter* must be of the crown side in B. R. Str. 622.

[*]No costs are given on a writ of *noctanter*. Str. 1069. B. R. H. 355.]

At the return of the *distringas*, the inhabitants may appear and plead to it; for the *distringas* contains a *scire facias*. Lut. 157. R. 1 Sid. 107.

And therefore there is no occasion for a *scire facias* after the *distringas*. Lut. 157.

And the inhabitants may plead that the persons were known. Lut. 175, 176. R. 1 Lev. 108.

That the damages are excessive. Lut. 147. 177. R. 1 Sid. 212. 1 Mod. 66.

Or any matter, which excuses the throwing down of the fences. Lut. 144. 176. [Vid. B. R. H. 355.]

That the misdoers are indicted. Cro. Car. 440.

And some inhabitants may plead one plea, and the inhabitants of another vill, another plea. Lut. 176.

So two of every vill may plead for all. 1 Lev. 108.

If the vills plead to the damages, there shall not be judgment for the erection of the inclosures till the plea be determined. 1 Mod. 66.

But if the vills do not plead to the excessiveness of the damages, they shall be bound by them, though the jury afterwards find less damages. R. 1 Sid. 212.

And if at first they do not take protestation to the damages, they cannot afterwards traverse. Ibid.

And if they do not come at the return of the *distringas*, they cannot afterwards plead. Semb. Cro. Car. 280.

If the vills do not plead, another *distringas* goes to levy the damages found. Cro. Car. 280. Jon. 306. (x)

(x) 1. By 29 G. 2. c. 36. and 31 G. 2. c. 41. the lords of wastes and commons, with the consent of the major part in number and value of the commoners, may inclose any part thereof for the growth of timber and underwood.—2. And by 13 G. 3. c. 81. three-fourths in number and value of the occupiers of open or common field lands are empowered, with the consent of the owner, rector and impropriator, and tithe owner, to make rules for the ordering, fencing, cultivating, and improving the tillage or arable lands lying in such common fields; and the major part, &c. of the persons having right of common may also alter the mode of depasturing common pastures.—3. And the 41 G. 3. c. 109. is an act for consolidating in one act certain provisions usually inserted in acts of inclosure, and for facilitating the mode of proving the several facts usually required on the passing of such acts.—4. The following points upon inclosure acts may be referred hither.—5. The owner of a tenement entitled to common in the waste, as well of the manor of which the tenement is parcel as of another, is, on the inclosure of both, entitled to a distinct allot-

[*]But the lord cannot improve against him, who has common in gross *sans nombre*. 2 Inst. 86.

Nor when he has common in gross, though it be for a certain number. 2 Inst. 86. 475. Semb. 1 Rol. 365.

ment in each. 7 East, 485.—6. A copyholder having a right of common in two manors, and having received an allotment out of one, in lieu of his right in that manor, is entitled to his full allotment out of the other when inclosed, whether the manors to be held under the same or different lords. And though the estate in respect of which he claims be partly enfranchised freehold, that does not distinguish his right as to the part enfranchised. 1 Mars. 50. 5 Taunt. 365.—7. If land, over which there are rights of common, is inclosed under a statute, the allotments received by the commoners in lieu of their rights are not held by the same tenure as those rights were held; the ownership in the land being given to them, they must hold by the same tenure as the late owner held before them, unless the inclosure act otherwise directs. 2 T. R. 415.—8. An estate of a customary nature is a species of tenure which cannot be created at this time of day; because it is an essential quality of such an estate that it must have been immemorially demiseable as customary estate; and as it must always have been of such quality, it follows that this quality cannot be created by any modern agreement. Hence, where the waste of a manor is inclosed and allotted to the commoners, they hold the allotments as freehold tenures; they were freehold before the inclosure, namely, the freehold of the lord. 2 M. & S. 175.—9. Commissioners under a common inclosure act have no jurisdiction over a towing-path along the bank of a river, which can subsist in that spot only. 2 B. & P. 496.—10. Commissioners under an inclosure act may take a bond of indemnification against the expences of a suit to be brought in pursuance of it, where there is a doubt whether those expences are payable out of the fund provided by the act. 2 B. & P. 89.—11. An inclosure act gave the parties aggrieved a right of appeal to any quarter sessions to be holden for the county of W. within four calendar months after the cause of complaint shall have arisen, and enacted that "the justices, at the said general quarter sessions are hereby required to hear and determine the matter of every such appeal." The sessions, in their discretion, may adjourn it when once properly lodged; though the act of the party in preferring his appeal must be within the limited time. 13 East, 352.—12. A private inclosure act, incorporating in itself the public general inclosure act, required parties to appeal for matters done under it, four months next after the cause of complaint shall have arisen. The commissioners under it set out the different public roads; but one which hitherto had been used as a public one is not amongst the number, and therefore is extinguished; for the general inclosure act enacts, that those not set out shall be stopped up and extinguished. Afterwards, the commissioners set out the road in question as a private road. Within four months after this last setting out, but more than four since the first, a party appeals to the quarter sessions, from the road not having been set out as a public one. Held, supposing an appeal from the decision of the commissioners lay, that he was out of time, his cause of complaint being, not that the road was made a private one, but that it was not set out as a public road. There was no road in existence when the setting out a private one was done. 2 M. & S. 80.—13. Complaint under 13 Geo. 3. c. 78. s. 19. is to be made "by appeal to the justices at the next quarter sessions after such order made, or proceeding had." Proceeding here means, not an act done, but legal proceeding, hence an appeal against an inclosure made by virtue of an inquisition, on a writ of *ad quod damnum*, must be made at the next sessions after the inquisition taken, and entered and recorded at the sessions, not at the next sessions after the stopping up of the road. 2 M. & S. 230.—14. An inclosure act, 53 Geo. 3. c. 61. directed, that if any person shall think himself aggrieved by any thing done in pursuance of it, he might appeal to any general quarter sessions held within six months after such cause of complaint. In November 1812, the commissioners under the act prepared a map of the different allotments, specifying, *inter alia*, that certain lands were allotted to a vicar, in lieu of tithes; held a meeting, which the vicar attended, and at which the map was shewn to him, and an agent was named by him to act on his behalf. On the 18th of the same month another meeting was held, and an alteration was made in the vicar's allotment, which the agent who attended the meeting approved of, and all present agreed to consider final. On the 22d November 1813, the commissioners gave the notice in writing required by the general inclosure act, dated on that day, that payment of tithes to the vicar should cease from the preceding 29th September. Within six months from the date of this notice, the vicar appealed, and held that he was in time. 1. The allotment to the vicar was not *per se* a grievance, nor did it necessarily become so, until there was a determination of his right to tithes. 2. Before the notice given, nothing final seems to have been done by the commissioners. 3 M. & S. 127.—15. Where an appeal is given against a rate under an inclosure act or otherwise, the party grieved cannot sue at law, though the rate is made up in part of charges which those who imposed it had no right to make, but which had reference to the general object of their jurisdiction. 5 T. R. 182.—16. The court, though empowered, will not con-

[*]So the lord cannot improve, where the tenant has common of turbary, piscary, estovers, &c. 2 Inst. 87.

So the lord cannot, upon pretence of an improvement, dig pits for coals, &c. 1 Sid. 106.

So the lord cannot improve, without leaving sufficient common.

Though he assigns sufficient in other lands. 2 Co. 25.

Though he alleges a prescription to improve; for that denies the right of common. R. Jon. 375.

If the lord improves, and does not leave sufficient common, the commoner may throw down the whole inclosure; for it stands upon his common. 2 Inst. 88.

But in an assize in such case the jury cannot find generally for the plaintiff, but ought to assign how much shall be sufficient. Ibid.

(H) WHAT INTEREST THE COMMONER HAS.

The commoner has no interest in the soil where he takes his common; and therefore he cannot meddle with the soil to dig there, &c. Bridg. 10. [Vid. 1 Bur. 265. 267.]

He cannot take wood, hay, or other profit there growing. 2 Leo. 202. Bridg. 10.

He cannot cut down bushes, fern, &c. without special custom; though they prejudice his common. Bridg. 10.

[A commoner, though he has by custom a right to cut fern, may not scatter the ashes which a stranger has made by cutting and burning it. T. 13 G. Str. 777.]

[*]Nor grant his common to the use of another. Bridg. 10.

solidate feigned issues brought under an inclosure act, where the questions raised are different. 5 Taunt. 167.—17. To make title to an allotment under an inclosure act, of a sixteenth, to be set out for the person claiming to be lord of a certain manor, it is sufficient, on the trial of an issue under the act, to shew that he is owner of the soil. It need not be proved that there is such a manor existing in law, or that the claimant is lord, properly so called. 2 Price, 101.—18. Inclosure bills are not to be considered as merely private acts. 1 Anst. 281.—19. Semble, that the determination of the commissioners under the general inclosure act, 41 Geo. 3. c. 109. is by the s. 8. of that act made final and conclusive, not being within the proviso in that section, which gives an appeal in specified cases to the quarter sessions. 2 M. & S. 80.—20. An act for inclosing the waste of a manor is passed at a time when the mines under the waste are out at lease, rendering rent. The act allots to the lord a certain portion of the waste, as a compensation for his right and interest in the soil; the commoners are to hold their allotments in fee simple; and there is a clause that the act should not defeat the lord's seigniories incident to the manor, but that he might enjoy all rents, fines, services, courts, &c. and all other royalties and manerial jurisdictions. Held, that the mines under the waste passed to the commoners under their allotments, (subject however to the lease,) and that if, by any construction the word "rents," had it stood unconnected, could have been intended as descriptive of the mines, yet that here it was obviously used as a species of the generic term, "seigniories." 2 T. R. 701.—21. Where an inclosure act (the 6th Geo. 3. c. 78. for instance) directs that the roads set out shall be "repaired by such person and persons" as the commissioners shall direct, such persons only as are interested in the inclosure are meant. 6 T. R. 20.—22. An inclosure act, 51 Geo. 3. c. 100. s. 21. directed the commissioners "to allot to the lord of the manor one-sixteenth part in value of the common, &c. for and in full satisfaction of his right as lord of the manor to the soil of the said common;" and by s. 29. directed them to allot the remainder of the common, &c. among the several proprietors thereof, and persons interested therein. Held, that the lord was entitled, besides this one-sixteenth, to compensation in respect of his demense lands. Were those lands to be granted to another, the grantee would be so entitled; and though the lord has no right of common as such, yet the right is inherent in the property, and only lies dormant whilst in his possession. Here, too, the words are not "other proprietors," distinguishing them from the lord. Had those been the words, as is sometimes seen in inclosure acts, the case would have been different. 4 M. & S. 440.

Nor make a trench to let out water which surrounds it. 1 Rol. 406. l. 17. Semb. 12 H. 8. 2. 15.

Nor stop up coney-borows, though his cattle fall and perish in them. 1 Rol. 405. l. 25. 2 Bul. 116.

[Even if the common is surcharged, but must bring his action. 1 B. M. 259. 268. 2 Wils. 51.]

Nor kill the rabbits. R. 1 Rol. 405. l. 15. 20. 2 Leo. 201. 2 Bul. 116.

Though he allege a custom or prescription to do it. Semb. Bridg. 10.

He cannot enter upon the soil, when he does not put his cattle there. 1 Rol. 406. l. 8.

Nor agist the cattle of a stranger there. 2 Leo. 202.

He cannot maintain trespass for damage to the soil or grass ; for he has no interest, but to take the pasture by the mouths of his cattle. 12 H. 8. 2. 8 Rol. 552. l. 7.

Nor an action upon the case against a stranger, if his rabbits go upon the common, for he may kill them. R. Cro. Car. 387. 1 Rol. 405. l. 39.

But a commoner may justify his entry, to put his cattle upon the common.

Or to see whether the grass be good, for the depasturing of his cattle. 1 Rol. 406. l. 10.

So, he may reform an abuse to the soil ; as he may dig down molehills. 1 Brownl. 228. 12 H. 8. 2.

Fill up with earth holes dug there. 1 Brownl. 228.

Let out water from a pond made there by the lord. Ibid.

Make a causeway for cattle to come there. Per Pollard, 12 H. 8. 2.

So, he may throw down inclosures, which prevent his coming to his common. Semb. 2 Inst. 88. Bridg. 10. Vide 1 Bur. 265. 267.

Put in his cattle, though the owner has sowed the land. 2 Leo. 202.

Throw down the inclosure of the common, though he do not put his cattle there at the same time. R. Litt. 38.

So, he may throw down fences, which are erected upon his common. R. 2 Mod. 65.

So, he may distrain the cattle of a stranger there damage-feasant. 1 Rol. 405. l. 42. Adm. Yelv. 129. 2 Leo. 202.

Or drive them out with a little dog ; without being compelled to distrain. R. 4 Co. 38. b.

[But he cannot cut down trees planted by the lord on the waste, although there be not a sufficiency of common left. 6 T. R. 483. 1 Bos. & Pul. Rep. 13.]

So, if the lord, by custom, be restrained to a small number of cattle, and he puts more there ; they may be distrained by him who has common. Per three J. Yel. 129.

So, if the lord puts in his cattle before the time for common, when by the custom, it should be fresh. R. 1 Rol. 405. l. 55.

[Wherever there is colour of right for putting in cattle, commoner cannot distrain ; where no colour, he may : so he may distrain a stranger's cattle, but not those of a commoner, though he exceeds his number. Where writ of admeasurement lies, he cannot distrain. [*]Whether he may distrain cattle surcharged where the right of common is for a number certain ? Q. 4 B. M. 2426. 1 Bl. Rep. 673.]

So, a commoner shall have an action upon the case against him who prejudices his common, an assize, or a *quod permittat*. Bridg. 10. Vide post, (I).

[*80]

Though the prejudice to the common be by digging clay, and laying and carrying it across the common ; though he has no interest in the clay or soil. R. Godb. 344. 2 Rol. 308. 344.

Though the defendant himself has common there. R. Godb. 344.

But if a commoner avows a distress for damage-feasant, he ought to allege, *quod communium tam amplo modo habere non potest*. R. 3 Lev. 104.

Vide post, (I).

(I) WHAT REMEDY THE COMMONER SHALL HAVE.

An assize, &c.

If the commoner has an inheritance, or estate for life, in his common, and is disseised, he shall have an assize. F. N. B. 180. L. Vide Assize, (B 2.)

Though the lord himself disseises him ; as if he surcharges the common, or approves, and does not leave sufficient for the commoner. F. N. B. 125. D.

So, if the commoner be disseised, he may have a *quod permittat* in the county, or C. B. F. N. B. 123. F. Vide Quod Permittat.

Or, if his ancestor was disseised ; but not in other degrees. F. N. B. 123. H.

So, if tenant in ancient demesne be deforced of his common, he may have a writ of right close for it. F. N. B. 11. K.

If a commoner surcharges the common, another commoner may have a writ of admeasurement of pasture, whereby the number of the cattle, with which the defendant, the plaintiff, and other commoners, who are not parties, may common, shall be ascertained. F. N. B. 125. B. 126. H.

And this writ is *viscontiel*, and not returnable ; upon which the plaintiff shall make plaint in the county court, as in replevin ; and the sheriff by precept shall warn the defendant ; and if he pleads nothing, or confesses it, he shall make admeasurement. F. N. B. 125. C. G.

And upon this shall go an *alias* and *pluries*, and if nothing be done upon it, nor cause shewn, an attachment against the sheriff. F. N. B. 125. F.

Or it may be removed by *pone* into C. B. where the plaintiff shall count, and have admeasurement. F. N. B. 125. F. 126. A.

By the st. W. 2. 7. after removal into C. B. a *distringas* goes to make proclamation at two county courts, and upon default, judgment. F. N. B. 125. G. 126. C. 2 Inst. 368.

By W. 2. 8. if the defendant in admeasurement of pasture, afterwards surcharges, a writ of *de secunda superoneratione* lies ; upon which he shall render damages, and forfeit the cattle surcharged to the king. 2 Inst. 370. F. N. B. 126. E.

[*] But the writ of admeasurement of pasture does not lie by the lord ; nor by tenant against the lord ; nor for common *sans nombre*. F. N. B. 125. D.

So, if a commoner be disturbed, whereby he cannot use his common, or cannot use it in *tam amplo modo*, he may have an action upon the case. 9 Co. 112. b. Vide Action upon the Case for a Disturbance, (A 1.)

So, if the lord or a commoner surcharges the common, whereby the plaintiff has not sufficient common, an action on the case lies. Lut. 107. [3 Wils. 278. 2 Bl. Rep. 117.] (y)

(y) Where the lord so deals with the soil as entirely to exclude the commoner, the latter may recover his right by his personal act ; but where the lord has only abridged his right, his remedy is by suit at law ; therefore, he is not justified in felling trees planted by the lord in disturbance of his right. 6 T. R. 483. 1 B. & P. 13. 3 Anst. 892.

[One commoner, who has surcharged, may nevertheless maintain an action against another for surcharging the common. 4 T. R. 71.

And the plaintiff needs not shew that he turned on any cattle of his own at the time of the surcharge, but only that he could not have enjoyed his common so beneficially as he ought. 2 Bl. Rep. 1233.] (z)

So if the lord or another drives his cattle out of the common. Lut. 103.

If a man claims common, where he has no right, the owner seised in fee shall have a *quo jure*. Vide Quo Jure.

[If plaintiff claiming right to cut rushes on a common cuts some which defendant takes away, trover lies. 3 Wils. 332.

Against a stranger for cutting and taking away rushes. Trespass and trover in one declaration. 3 Wils. 456. 2 Blk. Rep. 926.] (a)

Vide ante, (H.)

(K) WHAT REMEDY THE LORD SHALL HAVE.

So, if the lord has prejudice in his soil, where the common is, he shall have remedy by action, as in his other lands.

If the cattle of a stranger are in the common, he may drive them out, or impound them. 3 Lev. 41. (b)

Or maintain trespass.

[*]So, if the lord sees the cattle of a stranger, he may drive the cattle of a commoner with them to pound upon the waste, in order to sever them, without a custom for doing it. R. 3 Lev. 41.

So, by custom he may drive the cattle of a commoner, to see whether the cattle of a stranger be there, or whether the common be surcharged; but not without a custom alleged. 3 Lev. 41. 2 Lev. 87.

And if the common be surcharged, he may detain the cattle driven, till satisfaction for the trespass, without a prescription for it. R. 2 Lev. 87.

If the tenant himself surcharges the common, the lord may distrain the beasts, as damage-feasant. F. N. B. 125. D.

So, if the tenant puts in cattle not levant and couchant, where he has common only for cattle levant and couchant. 2 Rol. 706. l. 50.

Or the lord shall have trespass against his tenant.

But if the lord sets up a stack of corn, &c. upon the common, he cannot drive away the cattle which have common there; for it was his own fault. R. 2 Cro. 271.

(s) And in case by one commoner of pasture against another for a surcharge, the surcharge may be alleged generally. 3 Wils. 278. 2 Blk. 817.

(a) 1. A commoner may sue a stranger for depasturing, or another commoner for surcharging (unless by license of the lord), though he has sustained no immediate inconvenience, since thereby his right may be injured. 4 T. R. 71.—2. And the smallness of the damage sustained is no objection to an action upon the case by a commoner for disturbing his right, or deteriorating its enjoyment. 2 East, 154.—3. In case for a disturbance of common appurtenant created by modern grant, the plaintiff may claim it by reason of his possession. 15 East, 108.—4. In the case of an absolutely stinted common in point of number, one commoner may distrain the supernumerary cattle of another. 4 Burr. 2428. 1 Blk. 673.

(b) 1. And if one entitled to common of pasture agree and covenant with the owner of the soil not to exercise his right of common for a certain term, his cattle may be distrained by the owner damage feasant in the interim. 2 H. B. 4.—2. But where a man turns in his cattle under some color of right of common, the lord cannot distrain. 3 Wils. 126.—3. If a man who has a right of common upon the lord's waste for cattle levant and couchant on his land, surcharge the common, the lord cannot for that cause distrain. 3 Wils. 126.

[*82]

(L) HOW COMMON SHALL BE EXTINGUISHED.

If a man purchases land where his common is to be taken, whereby he has as high an estate in the land in which, &c. as in the land to which the common is appendant or appurtenant, the common shall be extinguished. R. 4 Co. 38. a. R. Cro. El. 570. Mo. 462, 3. Vide Suspension, (B, &c.)

{ So, if the owner of land to which common is appurtenant, purchases part of the land out of which common is to be taken, or the owner of part of the land out of which common is to be taken purchases the land, or a part of it to which common is appurtenant, the right of common becomes extinct as to the whole. *Livingston v. Ten Broeck*, 16 Johns. Rep. 14. }

So if a copyhold to which common belongs, is destroyed, the common is gone. Vide Copyhold, (K 6.)

So, if he, who has common appurtenant, purchases parcel of the land in which, &c. the whole shall be extinguished. Co. L. 122. a. R. 8 Co. 79. R. 1 And. 159.

So, if he who has common in gross, &c. Co. L. 122. a.

But if a man, who has common appendant, purchases part of the land in which, &c. it shall be apportioned; for it is of common right. Co. L. 122. a. R. 4 Co. 38. a. R. Mo. 463. 644. 8 Co. 79. a.

And he ought to prescribe for the whole till such a day when he purchased, &c. 4 Co. 38.(c)

So, if a man, who has common appurtenant, sells parcel of the land to which, &c. it shall be apportioned. Co. L. 122. a. R. 8 Co. 79.

And the alienee may prescribe as for common appurtenant to his parcel. 8 Co. 79.

Or, if common be for a certain number, the owner may sell all his common with parcel of his land to which, &c. and the whole shall be appurtenant to that parcel. R. 1 Rol. 402. l. 25. Cro. Car. 432.

Yet if a commoner purchases the improved part of the waste, his common shall not be extinguished; for by the improvement it was wholly severed from the manor. 2 Inst. 87.

[*](M) HOW SUSPENDED.

So, if a commoner who has common appurtenant, takes a lease of part of the land in which, &c. for life or years; all his common shall be suspended during the term. R. 8 Co. 79. a.

Vide suspension.

(N) WHEN IT IS NOT DESTROYED.

If all the inhabitants of a vill have common in such a place, and the ancient messuage of any of them falls, and a new one is built upon the same foundation, the common remains. R. 2 Leo. 45.

Or, if he builds a new house in the same place. 2 Leo. 45. Godb. 97.

But if the inhabitants of a vill claim common, and any one builds a new messuage there, where there was none before, he shall not have common; for it belongs only to the ancient inhabitants. R. 2 Leo. 44.

(O) WHEN REVIVED BY A NEW GRANT.

If a common be extinguished by unity of possession, if a lease be made

(c) If there be a custom for the commoner to inclose, on his inclosing, the remainder of the land is discharged from his right of common. 2 Wils. 269.

COMMON.

of the land to which, &c. with all commons therewith used or enjoyed; that amounts to a new grant of the common for years, if there be an averment that it was used. R. Cro. El. 570. (d)

Vide more concerning Common in Copyhold, (K 6.)—Chancery, (2 P.)—Pleader, (3 K 24.)

TENANT AND TENANCY IN COMMON. Vide **ABATEMENT**, (E 10.—F 6.)—**CHANCERY**, (3 V 4, &c.)—**DEVISE**, (N 8.)—**ESTATES**, (K 8.)

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Vide **JUSTICES OF PEACE**, (B 24, &c.)—**LEET**, (L 12, 13.)

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Vide **COURTS**, (C 1, &c.)—**PLEADER**, (C 4. 11, &c.—3 B 2.)—**QUOD PERMITTAT**, (D 2.)

[*]COMMON COUNCIL.

Vide **FRANCHISES**, (F 25.)—**LONDON**, (F.)

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COMMON RECOVERY.

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Vide **PLEADER**, (2 W 31.)

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CONCLUSION.

Vide **ABATEMENT**, (E 16.)—**ESTOPPEL**—**PLEADER**, (C 84. E 28, &c.—F 5.—S 35, &c.)

(d) 1. Where an incorporeal right, a common for example, heretofore appurtenant to land, is extinguished by unity of possession, a subsequent grant of the land, "with all commons thereto belonging, or in any wise appertaining," will not revive the former right, though exercised since the unity the same as before. 1 Taunt. 205.—2. Where it appears that certain tenants had been entitled to rights of common over certain lands, but of what nature did not appear, and the lands were conveyed in trust to permit those tenants to use the same, as before they had been accustomed; held, that those rights must be presumed to be such as might legally exist, notwithstanding a usage subsequent to the conveyance. 8 T. R. 396.

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[*]CONDITION.

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(A 1.) CONDITION IN DEED.

A man may annex to an estate a condition, by the performance or non-performance of which the estate may commence, or may be enlarged or defeated. Co. L. 201.

[*]And this may be by express words in the deed, or by implication of law. Ibid.

An express condition cannot be without deed. Co. L. 225.

And, therefore, a man cannot plead a condition to defeat an estate of freehold, without shewing the deed. Co. L. 225. Vide Pleader, (O 1, &c.)

Otherwise, where a condition is annexed to a chattel personal or real; as a term for years, ward, &c. 1 Rol. 413. l. 20. 25.

So a condition to a freehold may be referred to a matter not in writing, and may be supplied by averment.

As if a corrody be granted for life, *sec. quod per A. prius usitat, fuit*; it may be averred, that the corrody of A. was upon condition to attend the master, &c. 1 Rol. 413. l. 50.

If an annuity be granted *pro consilio* generally, it may be averred, that the grantee was learned in the law, and the annuity was for his counsel in the law. 1 Rol. 413. l. 52.

So a condition precedent, upon which an estate shall be created, may be without deed. Co. L. 216. a.

(A 2.) By what words it shall be created.—In the grants of a common person.

Divers words of themselves make an estate upon condition. Lit. s. 328. Vide post, (A 9, 10.)

As *sub conditione*. Lit. s. 328. 10 Co. 42. a.

Proviso semper. Lit. s. 329.

And the word *proviso* makes a condition, though joined with other words; as, provided always, and it is covenanted. Co. L. 203. b. 2 Co. 71. b. 1 Rol. 410. l. 30.

Provided, and it is agreed, &c. 2 Co. 71. b. R. Cro. Car. 128.

And therefore, if the word *proviso*, be the speaking of the grantor, feoffor, donor, &c. and obliges the grantee, &c. to any act, it makes a condition, in whatever part of the deed it stands; and though there be covenants before or after, it is not material. R. by all the judges, 2 Co. 70, 71, &c. Cromwell. R. Dy. 311. b. Per two J. Dy. 13. b.

So though it stands indifferent, whether it be the word of the lessor or the lessee; as, provided, and it is agreed between the said parties; for it shall be referred to the lessor. 1 Rol. 407. l. 50. Dub. Dy. 152. Acc. Dy. 6. b.

And though all the residue of the words be the speaking of the grantee, and words of covenant, as provided, and the grantee covenants, &c. R. 2 Co. 71. b. R. Mo. 707. R. Jon. 169.

So words of limitation, if they cannot be taken as a limitation, shall be taken for a condition. Eq. Abr. 105.

Otherwise if the word *proviso* be annexed only to make a qualification, and not to defeat the estate. Mo. 307. 2 Co. 72. a. Mo. 707.

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[Proviso, if lessee commit waste, the lease shall determine ; is a condition, not a covenant. Bunb. 114.]

So the words *ita quod*, make a condition of themselves. Lit. s. 329.

And *quod si contingat*. Lit. s. 330.

But not without a conclusion, that it shall be lawful to the lessor to re-enter. Lit. s. 331. Pol. 75.

[]So other words make a condition, if there be added a conclusion with a clause of re-entry. As, if. Co. L. 204. a.

Or though the conclusion does not give a re-entry, but says only, that if the feoffee, &c. doth, or doth not, such an act, the estate shall cease, or shall be void. R. 1 Rol. 408. l. 15.

Or that the feoffment shall be void. R. 1 Rol. 408. l. 20. 25.

Or that the deed of feoffment and livery shall be void, for that is of the same effect as if he had said the feoffment. Dub. 2 Rol. 408. l. 30.

So if after the feoffment, the feoffee by another deed grants, that if he doth not such an act, the first deed shall be void. 1 Rol. 408. l. 38.

So if the conclusion be, that the feoffor shall take back his estate. 1 Rol. 408. l. 50.

So *ea intentione*, with a clause of re-entry, makes a condition. Semb. 1 Rol. 407. l. 37. Dy. 138. b.

So to avoid a lease for years, which is but a chattel, there is no need of such precise words as to avoid an estate of freehold. Co. L. 204. a.

And therefore, if the lessor says, *quod non licebet* for the lessee to sell, grant, &c. *sub pœna forisfacturæ*, that makes a condition. R. Dy. 65, 6. Co. L. 204. a. Or says, and the lessee shall dwell on the premises on pain, &c. Co. L. 204. a. Dy. 79. a.

So if the lessee covenants that he will, &c. *sub pœna forisfacturæ*. 1 Rol. 408. D.—Semb. Cro. El. 202. R. 2 Cro. 398. 1 Leo. 246.

So in grants executory, the cause, or consideration of the grant makes a condition. Co. L. 204. a. 10 Co. 42. a. 1 Sand. 320. 2 Sand. 352.

As if a man grants an annuity *pro acra terræ*, or *pro decimis*, which are evicted, the annuity ceases. Co. L. 204. a.

Or, *pro consilio*, or *quod præstaret consilium*, if the grantee refuses his counsel. Co. L. 204. a.

Otherwise, if a man grants an estate of inheritance, or freehold, *pro consilio*, or *pro acra terræ*, the annuity does not cease if the counsel be refused, or the land evicted. Co. L. 204. a.

Yet a feoffment by a woman *causa matrimonii prælocuti* determines upon the marriage, or if the feoffee refuses the marriage. Co. L. 204. a.

Otherwise, if the feoffment be by the man to the woman : for the woman shall be favoured in respect of the modesty of her sex, which does not permit her to take counsel in such a case. Co. L. 204. a.

If a condition has false Latin, yet if the sense may be known, it is good. 1 Rol. 413. l. 30.

(A 3.) In the king's grant.

So, in the king's grant, words make a condition, which do not make a condition in the deeds of a common person. Co. L. 204. a.

As *ad effectum*, or *ea intentione*. Ibid.

So *ad faciendum*, or *faciendo*. Ibid.

Ad propositum, &c. Ibid.

Ad solvendum. 10 Co. 42. a.

But if at the end of a charter, by which a grant is made of an advowson,

there be a clause, *quod concessimus* that the grantee may amortise [*] to a chantry to sing for the souls of our progenitors ; this does not amount to a condition, but to a licence. R. 43 Ed. 3. 33, 34. Fitz. Condition, 7. 1 Rol. 407. l. 30.

(A 4.) In a will.

So words in a will make a condition, which will not make it in a deed : as if a man devises land to another, *ad faciendum*, or *ea intentione* that he do such a thing ; this makes a condition. Co. L. 204. a.

Vide devise, (N 9, 10, 11.)

So if he devises to another *ad faciendum*, or *ad propositum*, that he do, &c. Co. L. 204. a.

So if he devises to sell. 1 Rol. 401. l. 45. Co. L. 236. b.

Or *ad solvendum*, or paying. Co. L. 236. b. 1. Leo. 174. R. Cro. El. 146. Mo. 853.

So a devise to A. provided, and my will is, that he keep it in repair, makes a condition. R. 1 Leo. 174.

So there shall be a condition in a will, though there be no words that the estate shall cease : as a devise to a wife, provided that she shall have the rent only if she departs out of London. Per cur. Cro. El.

But if the words be insensible, and the intent uncertain, they shall not be construed as a condition.

A devise to A. and his heirs, upon trust that he shall do, &c. is a trust, but does not make a condition. R. Mod. 594.

(A 5.) In obligations.

So in obligations there need not be such precise words ; for if the words be, the condition is, that if A. do not grant, &c. the obligor covenants that he will grant ; it is a good condition. R. 1 Rol. 409. l. 10. Vide Obligation, (B 1. E.)

So if the words be, now it is agreed that if A. pay, the bond shall be void. R. 1 Rol. 409. l. 15.

(A 6.) What words do not make a condition.

But in grants of a common person, *ad faciendum*, *ad effectum*, *ad propositum*, or *ea intentione*, do not make a condition. Co. L. 204. R. Dy. 138. b.

So words of covenant or grant of a lessee do not make a condition. Per two J. Dy. 6. a.

So words in restraint of a grant do not make a condition ; as if the lessor grants fire-bote, provided that he do not take it of the great trees, it will be waste, but no cause of re-entry, if he does take it of the great trees. R. 3 Leo. 16.

So words insensible do not make a condition : as a lease for forty years, upon condition if she lives so long, and keeps herself sole, without more, does not make a condition ; for the intent is uncertain. R. 1 Rol. 411. l. 23. Poph. 99. Cro. El. 414.

Nor words to a foreign intent ; as if a scollment be to A. *et si contingat* that he dies in the life of the feoffor, that he pay an annuity to B. Per Pol. 75.

Or repugnant, or uncertain. Pol. 76.

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[*](A 7.) To what estate it may be annexed.

A condition may be annexed to an estate of inheritance, freehold or for years.

So, it may be annexed to a grant of tithes by the clergy. 1 Rol. 412. l. 53.

If a feoffment be of two acres, a condition may be, that he shall re-enter into one. 1 Rol. 412. l. 50.

So it may be annexed to an use, and shall be executed by st. 27 H. 8. so that the donor and his heirs may take advantage of the condition. R. Sav. 77.

(A 8.) In what conveyance.

A condition may be annexed to a devise, as well as to another conveyance. 1 Rol. 412. l. 25.

And to a devise since the st. 32 & 34 H. 8. as well as to a devise by the common law. 1 Rol. 412. l. 27.

Or to a devise of an use by the common law. 1 Rol. 412. l. 25. Dy. 127.

So a lessee may surrender to the lessor, upon condition. 1 Rol. 412. l. 20.

And a surrender of a copyhold may be upon condition. 1 Rol. 412. l. 17.

So a release of an estate may be upon condition.

And a confirmation. 1 Rol. 412. l. 22.

And a release of a right. Co. L. 274. b. 1 Rol. 412. l. 15.

So a contract may be upon condition. 1 Rol. 413. l. 4.

And a charter of pardon. Co. L. 274. b.

And a grant of denization. Co. L. 274. b.

So, a release of a personal thing may be upon a condition precedent, but not upon a condition subsequent; for a personal action once suspended shall be extinguished. R. 1 Rol. 412. l. 30. 35.

So, an attornment. Co. L. 274. b. 2 Co. 68. a. R. 9 Co. 85. b. 1 Rol. 412. l. 45.

So, a manumission of a villein. Co. L. 274. b.

But a condition cannot be released upon condition; for the condition annexed to the release shall be void, and the release shall be good. Co. L. 274. b.

(A 9.) How it shall be annexed.

The condition may be contained in the same deed.

Or indorsed upon the obligation or deed. 1 Rol. 413. l. 10.

Or may be contained in another deed executed upon the same day. 1 Rol. 414. l. 20.

So, a condition to defeat an estate may be annexed to the reservation of the rent, explaining the manner of payment. R. Mod. 52.

But if a disseisee release his right, and the disseisor by his deed at a subsequent day, grant that the release shall be upon such a condition, the condition is void. 1 Rol. 414. l. 15.

(A 10.) Who shall be bound by a condition.

If an express condition be annexed to an estate made to a feme covert, she shall be bound by it. 1 Rol. 421. l. 32. Vide post, (F).

[*]Or, to an estate made to an infant. 1 Rol. 421. l. 35.

Or, to an estate made to any one of full age, who dies; his heir within age shall be bound by the condition. R. 1 Rol. 421. l. 37.

So, a condition in law, annexed to an office which requires skill or confidence, binds an infant and feme covert. Co. L. 233. b.

So, if an infant or feme covert does waste, it shall be a forfeiture. Ibid.

But if an infant or feme covert aliens in mortmain, it is not an absolute forfeiture. Ibid.

(B) CONDITION PRECEDENT.

(B 1.) What shall be.

A condition is precedent or subsequent.

[There are no technical words to distinguish conditions precedent and subsequent; but the same words may indifferently make either, according to the intent of the person who creates it. C. T. T. 164. Vide 1 Term Rep. 645.]

A condition precedent is such as ought to be performed before the estate vests, or the grant or gift takes effect.

As, if a man leases land for years, upon condition that the lessee, if he pays such a sum within two years, shall have the fee. Co. L. 216. a.

If a man binds himself, if he recovers twenty acres, to give a moiety to B. if he recovers only ten acres, he is not bound to give any part. 1 Rol. 433. l. 21.

If a man grants a sum for the doing of such an act, or, to such an one if he does it: this is a condition precedent, for the duty commences by the performance. 1 Rol. 414. l. 25 *ad* 35.

So, if he acknowledges that he owes so much, and then binds himself in a penalty for the payment. R. 1 Rol. 414. l. 35.

If a submission to an award be *ita quod fiat*, &c. this is a condition precedent. 1 Rol. 416. l. 3. (c)

If a devise be of the residue after debts and legacies paid; it is a condition precedent that those be first paid. R. 1 Rol. 415. l. 35.

Or of land, that it shall be sold, if the personal estate be not sufficient for the payment of debts. R. Jon. 328.

[*] If a settlement be in trust, that if A. marries B. after the age of sixteen years, and they have issue male, the estate shall be to A. and B. for their lives; it shall be a condition precedent, that there be the marriage and issue male, before the estate vests. R. Ca. Parl. 84.

So, if a condition be annexed to a thing, which cannot be done but on a con-

(c) 1. The words "*ita quod*," when applied to a thing to be done, make it a condition precedent. Ld. R. 760.—2. Thus if a creditor agrees to take a composition for his debt, so as it is paid by a particular day, the payment by the day is condition precedent. Ld. R. 760.—3. So if a man covenants to convey lands *ita quod* 10*l.* be paid to him by Michaelmas, he need not convey the lands till he has the money. Ld. R. 766.—4. Upon a contract whereby it was agreed between I. S. & I. N., that I. S. should deliver to I. N. certain goods, and in consideration thereof that I. N. should pay I. S. a stipulated sum for the said goods, in case a particular event should happen, the delivery of the goods is not a condition precedent to the right to demand the money if the event takes place; the mere agreement for the delivery of the goods being the consideration for the promise to pay the money. *Martindale v. Fisher*. P. 18 G. 2.—5. On an agreement whereby the one party undertakes to perform a certain act, and the other in consideration thereof undertakes to pay a sum of money, the performance of the act is a condition precedent to the right to demand the money. Ld. R. 662.—6. But if a day had been fixed for the payment of the money, and the act would not have been performed until after the day, the money would nevertheless have been payable on the day. Ibid.

dition precedent, it shall be construed to be a condition precedent; as, if a man releases an obligation to A. provided that B. pays him 20*l.* at a future day. R. 1 Rol. 415. l. 15.

So, in all personal contracts, the word *pro* makes a condition precedent; as, if I contract to sell a horse for 10*l.* Hob. 41.

[The word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties. 1 Str. 571.

Where there is no mutual remedy, it shall be a condition precedent; as where the defendant by deed-poll promised to accept of the plaintiff 500*l.* stock, so soon as the receipts should be delivered out by the company, and would pay for the same 950*l.* on a particular day; the defendant being the only party covenanting, and consequently, there being no remedy to compel the plaintiff to deliver the receipts; plaintiff must shew either a delivery or tender and refusal before he can bring his action for the money. Str. 569.

As where plaintiff covenanted to transfer stock, and the defendant to accept and pay for it, the plaintiff need not shew a transfer or tender. Str. 535. Vide 1 Ld. Ray. 665. Vide etiam Doug. 689.]

Otherwise, generally where there are mutual covenants. R. 1 Sand. 320. R. 2 Sand. 156.

Yet, if A. covenants to assure land, and B. covenants for the performance of it to pay; he is not bound to pay till the land be assured. 2 Sand, 156. (S)

(S) 1. It is laid down that to a condition precedent or subsequent, no technical words are requisite; neither do they depend upon their place in contract; whether a condition be precedent or subsequent, depends upon the nature of the transaction, and meaning of the parties. 1 T. R. 638. Anon. Lofft. 194. { Vide *Barruso v. Madan*, 2 Johns. Rep. 145. *Cunningham v. Morrell*, 10 Johns. Rep. 203. *Seers v. Fowler*, 2 Johns. Rep. 272. *Havens v. Bush*, 2 Johns. Rep. 387. *Green v. Reynolds*, 2 Johns. Rep. 207. *Jones v. Gardner*, 10 Johns. Rep. 266. *Ferris v. Purdy*, 10 Johns. Rep. 359. *Reab v. Moor*, 19 Johns. Rep. 337. *Warren v. Sproule*, 2 Marsh. 534. } —2. So that whether mutual stipulations in a contract are or are not dependant one on another, and therefore, whether or not an action lies for one party, without previous performance, or offer to perform the stipulations on his side, depends on the good sense of the case. 6 T. R. 570. 7 T. R. 125.—3. So that in construction, conditions are to be taken as precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and technical words, encountering such intention, must yield to it. 6 T. R. 668.—4. *The following are examples of conditions precedent.*—A. assigns his effects to B. for the benefit of his creditors; and among other things, a lease of a farm from C., which contains a covenant not to assign without C.'s consent in writing. B. agrees to assign the lease to D.'s nominee; D. to pay the expence of the assignment, and 180*l.* on a day certain, for the improvements and manure; to take the crops at a valuation; and to have immediate possession. Held that, to support an action on this agreement, B. must shew that he had obtained C.'s consent in writing to the assignment; though D. had taken possession of the premises, had cut down the crops, and had paid part of the 180*l.* to B. 2 Mars. 332. 7 Taunt. 9.—5. There is a stipulation in a lease, that if the lessee, after a given time, should be minded to determine the tenancy, and of such his mind give six months' notice, then and in such case, from and after payment of all arrears, and performance of covenants, the lease should terminate. Held, that the payment of arrears, and performance of covenants, was a condition precedent to the lessee's right to determine, as well as the giving six months' notice; both the words, from and after, are sufficient to create a condition precedent; and the intention of the parties, as inferred from the reason of the thing, that they were used for that purpose, is apparent. 6 T. R. 665.—6. By terms of insurance, the assured was, in case of loss, to procure a certificate from certain persons, of his character and their belief that the loss was without fraud. Held, that the procuring of such certificate was a condition precedent to his right under the policy. 6 T. R. 710. 2 H. B. 574.—7. A covenant, in a charter party, by the freighter, that a certain part of the outward freight should be paid on the delivery of the ship's outward cargo, is conditional. 3 M. & S. 308.—8. Plaintiff covenants to be the defendant's hired servant for a year and a quarter; and that he, the plaintiff, would pay at the expiration of the term 200*l.*, and that at the end of the term he, the defendant, would surrender his trade and business to J. P. the plaintiff's nephew, or such person as the plaintiff should appoint; and thereupon breach as-

[*][On a contract to transfer stock on payment of money, the payment of the money is not a condition precedent, but a concurrent act; if the transferor does not attend, the plaintiff need not shew he had the money ready; if he attends, the plaintiff must lay down the money, though not so as to part with it till transfer. Str. 458. Vide Doug. 684.]

In consideration, that the plaintiff, at the request of the defendant would execute to the defendant a general release, the defendant promised to pay: this is a condition precedent, to give or tender a release executed. 2 Bur. 900.]

signed "that he did not surrender," &c. Demurrer, that plaintiff did not find sufficient security for the payment of the sum stipulated. The finding the security is a condition precedent, to be first performed, before the plaintiff was entitled to the surrender. Anon. Loft. 194.—9 *The following are examples of conditions not precedent.*—Where the same deed contains a substantive grant of an annuity and a covenant to pay the same, if first personally demanded, in an action upon the grant, a demand need not be averred. 2 Wils. 221.—10. On a sale of growing hops at so much per cwt. to be delivered in pockets with a reasonable time after gathering, the payment of the price is not a condition subsequent. 2 N. R. 355.—11. Where by the terms of a contract of sale, a draft of the title is to be delivered within (e. gr.) three months, it is not a condition precedent to the vendor's right that it be delivered within that precise period. 1 M. & S. 111.—12. Covenant to permit the plaintiff, in the last year of the term, to sow clover among the defendant's barley. Breach that defendant sowed without giving plaintiff notice. Plea that defendant did not prevent, held good. Cowp. 125.—13. Lessee covenants to leave sufficient compost on the soil of landlord at the end of the term, he, the lessee, having the yard, barn, and a room to lodge in, and dress diet. This is a mutual covenant and not a condition. Loft. 56.—14. Semble, that where the freighter covenants to pay freight, in consideration of the terms before mentioned, one of which is, that the ship shall sail on or before such a day; it is not a condition precedent. 4 East, 477.—15. Sailing with the first convoy is not a condition precedent, unless expressly made so. 12 East, 381.—16. Where the agreement was that the master should load a complete cargo, and proceed and deliver the same, on being paid freight at so much per ton; held, that the delivery of a complete cargo was not a condition precedent to the right to freight. 10 East, 295.—17. Where freighters covenant that in case the outward cargo cannot be delivered at X., the master should be at liberty to return to London, and they would pay him so much for dead freight immediately upon arrival; the master, to entitle himself to the money, need not proceed direct to London. 11 East, 232.—18. In an agreement between A., the proprietor of a patent, and B., after reciting, that it had been agreed between them that A. should permit B., during the continuance of the patent, to use it; it was stipulated that B. should pay A. 500*l.* and that A. should teach B. the use of the patent. Held, that as the consideration on the part of A. was twofold.—1. The giving to B. a right to use the patent; 2. And the instructing him; and that as the first, which was principal part, was executed, A. might sue for the 500*l.* without averring that he had instructed him. 6 T. R. 570.—19. Articles for a co-operation, by which the plaintiff agreed to take the defendant as a partner and to give him half the interest in the lease of the house, to commence from and after the 29th Sept. The defendant covenanted to pay 300*l.* on or before that day, as a premium to be admitted partner. On non-payment at the day, the plaintiff may sue, averring his readiness to have taken the defendant as a partner, without executing or tendering articles of co-partnership, or a conveyance of the lease. 1 Anst. 245.—20. Where the agreement was, that A. should, within two months, pay, 1500*l.* and in consideration thereof B. should deliver up all securities and execute a general release; held, that performance by B. was not a condition precedent to his right to the money. 2 N. R. 233.—{ 21. In mutual promises, where money is to be paid on a day certain, and the act to be done by the other party, is to be done on the happening of a certain event contemplated to take place before the time of payment, and the event happens accordingly, if the party fails to perform the act, he cannot sustain an action for the money. Johnson v. Reed, 9 Mass. Rep. 78.—22. A strict performance of a condition is necessary to enable a party to enforce his contract against the other. Appleton v. Crowninshield, 3 Mass. Rep. 443.—23. Where mutual covenants go only to a part of the consideration, and a partial breach may be satisfied in damages, the defendant cannot set it up as a condition precedent, but the covenants are to be considered as independent. Bennet v. Pixley's Ex'rs. 7 Johns. Rep. 249. Hutcheson v. Creel, 2 Litt. 348.—24. If the defendant's liability depends on a previous act to be performed by the plaintiff, performance must be alleged. Stuteville v. Miles, 2 Marsh, 426. Vide Allen v. Philips, 2 Litt. 2. Jewell v. Thompson, 2 Litt. 52.—25. In independent covenants, performance need not be alleged. Payne v. Bottisworth, 2 Marsh, 429. }

[*](B 2.) Condition to have a fee, when good.

Land may be conveyed for a less estate, upon condition that if such a thing be performed, the grantee shall have a fee. Co. L. 216.

And such a condition precedent may be annexed to an estate-tail, which does not merge by the accruing of the fee, as well as to an estate for life or years. R. 8 Co. 75. a. 76. a. Ld. Stafford.

And to rents, advowsons, &c. which lie in grant, as well as to an estate in land. R. 8 Co. 75. a.

But where such condition is annexed, there ought to be a particular estate granted, as a foundation upon which the fee shall accrue : as an estate-tail, for life, or for years. 8 Co. 75.

And the particular estate ought to be permanent ; and therefore, to an estate at will such condition to have a fee cannot be annexed. Per Coke, 8 Co. 75. a.

So if the particular estate granted be for years, but subject to be destroyed upon a contingency, it is not sufficient : as if an estate for years be granted, upon condition, that if he pay ten shillings within a year, the lessee shall have it for life, and if he pay twenty shillings after the year, he shall have the fee ; the condition to have the fee is not good ; for if he pays the ten shillings, by the accruing of the estate for life, the term for years was merged. Ibid.

And the estate for life, being only possible and contingent, is not sufficient to support the condition to have a fee. Ibid.

And as the particular estate ought to be permanent, the privity of the estate ought to continue ; for, if the grantee or lessee assigns, the estate in fee cannot accrue. 8 Co. 75. b.

Or, if the grantee accepts a release for life, or in tail, from the lessor. Ibid.

Or, if a particular estate be granted to two, and they make partition. 8 Co. 75. b. 76.

So, if the grantee assigns, though afterwards he takes back the same estate. 8 Co. 75. b.

Otherwise, if one lessee dies ; for then the privity does not determine. 8 Co. 75.

Or, if the lessee leases for a less term. Ibid.

Or, leases for the whole term, upon a condition, and enters for the condition broken. Ibid.

Or, if the lessor dies, or aliens the reversion. Ibid.

The particular estate and the condition to have a fee ought to be granted by the same deed, otherwise the fee will never accrue. 8 Co. 77. a.

Or, by different deed executed at the same time. Ibid.

But though the condition be precedent to the accruing of the fee, it does not determine the particular estate to which it is annexed ; as, if a lease be made to A., B., and C., and if A. dies living B., then to B. and his heirs ; though this contingency happens, the estate of C. is not determined. Pol. 76.

(B 3.) At what time an estate shall vest upon a condition precedent.

If a lease be for years, with a condition, that if the lessee does such a thing, he shall have the fee, and livery be made to the lessee ; he [*] has the

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fee immediately, though, by the words, the performance ought to precede the estate ; for the livery cannot expect *in futuro*. Co. L. 217.

But, generally, the estate does not vest till the condition precedent performed ; and therefore, if a personal thing be granted upon a condition precedent ; the property does not vest till the condition performed.

[So, if a devise be that if A. and B. shall marry into the families of C. or D. and either of them have a son, then the estate to go to that son ; if they shall not marry, then to E. They marry, but not into the favoured families : E. has no claim till after their deaths, for the condition as to him is precedent, and they have their whole lives to perform it in. 1 Brown, 55.]

So, if a release be of an obligation, or personal action, upon a condition precedent ; the action, &c. is not suspended till the condition performed. R. 1 Rol. 412. l. 35.

So, if an advowson, or other thing which lies in grant, be granted for years, with condition to have a fee ; the fee does not vest till the condition performed. Co. L. 217. b.

So, if the king grants for years, with condition to have the fee ; for there no livery is necessary. Ibid.

So, if a common person grants for years, and by a subsequent deed gives the fee, upon a condition precedent, to the lessee ; for then there is no need of livery. Ibid.

Or, if he grants for life, with such a condition, and makes livery ; for then the livery has effect, and does not expect. Co. L. 217. b.

After the condition performed, the estate in fee vests without other solemnity ; otherwise it could never vest. 8 Co. 76. b.

Though it be in the case of the king. Ibid. (g)

(g) 1. Where covenants are conditional and dependent, the performance of the one is a condition precedent to that of the other. Dougl. 689.—2. And therefore if the right of A. against B. is made to depend upon the act of C. over whom B. has no controul ; A's right does not arise until the act is performed, however entitled he may be to performance. 6 T. R. 710. 2 H. B. 574. Id. 577.—3. Yet semble, that where performance of a condition precedent, on the precise day stipulated, is rendered impossible from the deed having been executed after the day, the right arises by a subsequent performance. 4 East, 477.—4. An inchoate act, which is to be consummate on the performance of a conditional act required to be first done by the party who is the object of such inchoate act, and where the performance rests wholly with such party, becomes, when consummate by the performance on his part of such conditional act, an effectual act for the benefit of the inchoate actor, by relation from the time of such his inchoate act done. 4 East, 95.—5. And an offer by one party, with an immediate ability of performance, 8 East, 437, to perform a condition precedent, with a refusal by the other to accept it, is equivalent to performance. 1 T. R. 638.—6. Where freight reserved monthly, is payable on the arrival of the ship in her port of discharge, an offer by an owner to perform the voyage, and refusal by the freighter, &c. are not equivalent to actual performance. 8 East, 437.—7. Where a condition precedent is to be done at a particular time and place, if the party to whom it is to be done does not attend, a tender in law will be sufficient, namely, by shewing that every thing has been done by the other, as far as in him lies, towards the execution of the contract, as by remaining at the place appointed to the last time of that day when a tender could have been made. 5 East, 107. 1 Smith, 306.—8. Where a request was originally essential to the case, it is dispensed with by shewing that the party had incapacitated himself from performing it. 10 East, 359.—9. The non-performance of a covenant by the owner forthwith to make the ship tight, &c. for a voyage of 12 months gives the chartered party an option of repudiating his contract ; but if he takes to the ship, he is bound to fulfil it. 10 East, 555.—10. Where the participle "doing," "performing," &c. is prefixed to a covenant, it is a mutual covenant, and not a condition precedent. 2 Blk. 1312.—11. If A. agrees to do an act on or before a particular day, in consideration of which B. agrees to pay him a sum of money on or before that day, the rights of each are conditional, depending upon the performance of, or what is equivalent thereto, the offer to perform that which he has stipulated for. 4 T. R. 761.—12. Where mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 1 H. B. 270.—13. If goods are sold at a

[*](C) CONDITION SUBSEQUENT.

What shall be.

A condition subsequent is such as defeats an estate by some subsequent act.

[*]As, a fine be to the use of another, or a feoffment, &c. upon condition, that if such an act be afterwards performed, the estate shall be void.

So, in every case, where the intent appears, that the estate shall be vested till the condition be performed, it shall be a condition subsequent; as, if a fine be to A. in fee if B. does not pay so much before Michaelmas, and if he pays, then to B. in fee; for it appears that A. shall have the land till B. pays. R. 1 Rol. 415. l. 45.

So, a devise to A. if he lives till his age of twenty-one years, upon condition, that if he dies before, it shall go to B. and his heirs, shall be a condition subsequent; for the intent appears, that A. shall take immediately. R. 3 Lev. 132.

A devise of a term to A. and that if his wife permits his enjoyment for three years she shall have his goods as executrix, but if she disturbs him,

certain price, to be delivered at a certain place, within a specified time, the acts of payment and delivery are concurrent, so that the vendee cannot sue for non-delivery, without averring a readiness to pay, nor *vice versa*. 7 T. R. 125. But a readiness is sufficient without a tender. 2 B. & P. 447.—14. Where two acts are to be done at the same time, as where A. covenants to convey an estate or business to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without shewing performance of, or an offer or readiness (which last is sufficient, 2 B. & P. 447. 7 Taunt. 314. 1 More, 56. Dougl. 684.) to perform his part. 4 T. R. 763. 7 T. R. 125. 8 T. R. 366. 1 East, 203. Vide Lofft, 198.—15. Where the mutual stipulation in a contract of sale are dependent on each other, it is not sufficient in an action by the vendor for the price to aver that he has conveyed a portion of the property sold; a conveyance, or a readiness to convey the whole, must be shewn. 1 East, 619.—16. Where the property of the thing sold is already vested in the purchaser, the vendor may sue for the price, without tendering the thing of which he happens to remain in possession, as where the purchaser gave earnest. 5 T. R. 409.—17. Where in a contract there are mutual stipulations, and a day is fixed for performance by one party, but none for the other, whose performance too, may, within the fair meaning of the contract, be delayed by circumstances beyond that of the former, the stipulations are conditions independent of each other, so that an action lies against the former party for non-performance, though the latter has not fulfilled, or offered to fulfil, the stipulation on his part. 6 T. R. 670.—18. Where a covenant or promise goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant; and an action may be maintained for the breach of the covenant, without averring performance in the declaration. 1 H. B. 273.—19. Under an agreement to build a house by a certain day, the consideration money is to be paid by instalments at particular stages of the work. Held, that the non-completion by the day appointed was no answer to a demand of the instalments for completing the different stages. 2 H. B. 389.—20. If A. on his part covenants with B. to carry a cargo to X. and having so done, the ship should receive a return cargo; and B. on his part covenants with A. that he would provide a ship a return cargo to X.; B. is bound to provide one, the ship being in readiness to receive it, though A. has not delivered the outward cargo; the words, "having so done," not creating a condition precedent on the part of A. The words are those of A. and mean, that when the ship is ready to receive a cargo he will accept it; the covenant on the part of B. is qualified, "to provide and ship a return cargo at X." not adding "on the delivery of the outward cargo." 3 M. & S. 308.—21. A. the proprietor of a patent, in consideration of 500*l.* agreed to be paid by B., covenanted that he would, with all possible expedition, teach him the use of it, and B. in consideration of such covenant, covenanted that he would, on or before such a day, or sooner, in case A. should have sooner finished his instructions, pay him the money. Held, that the covenant for instruction, and for that payment, were independent of each other, so that A. might sue B. for non-payment, without averring that he had instructed him. 6 T. R. 570.—22. Where there are mutual and independent covenants, either party may recover damages for a breach by the other, and it is no excuse for the defendant to allege a breach by the plaintiff of the covenants on his part. Dougl. 690.

his son shall be executor; the wife may sue as executrix within the three years, for the words, that the son shall upon disturbance, shew the intent, that the wife shall be executrix in the meantime. R. Cro. El. 219.

(D) WHAT CONDITIONS ARE NOT GOOD.

(D 1.) If they are impossible.

If a condition precedent to a feoffment, &c. be impossible at the time, or afterwards becomes impossible, the feoffment shall be of no effect; for, till performance, the estate cannot vest. Co. L. 206. 1 Rol. 420. l. 35.

If a condition subsequent to a feoffment be impossible at the time of the making, the estate of the feoffee is absolute, and the condition shall be void. Co. L. 206. a. 1 Rol. 420. l. 30.

So, if the condition to an obligation, recognizance, &c. be impossible at the making, the obligation is single. Co. L. 206. a. 1 Rol. 420. l. 30. R. 3 Lev. 74.

So, if a condition to a feoffment, &c. be possible at the making, and afterwards becomes impossible by the act of God, the estate of the feoffee is absolute; for, being vested, it cannot be divested without the performance of the condition, which was for the benefit of the feoffee. Co. L. 206. a. 219. a. 1 Rol. 449. l. 50. R. 1 Sal. 170.

So, if it becomes impossible by the act of the feoffor himself. Co. L. 206. b.

But if the condition of an obligation, recognizance, &c. was possible at the making, and afterwards becomes impossible by the act of God, of the law, or of the obligee himself, the obligation shall be saved. Co. L. 206. a. 1 Rol. 449. l. 35. 451. l. 40. 45. Vide post, (D 7.)

So, if a condition be in the disjunctive, and gives liberty to do one thing or another at his election, and the one part becomes impossible; as, to enfeoff A. or make him his executor, and he dies before the obligee. R. M. 357. Cro. El. 277. Per three J. Cro. El. 398. 5 Co. 22. a. Poph. 98. 1 Rol. 450. l. 35. R. Jon. 171. 2. 181. 2 Mod. 202, 203. Vide post, (K 1, &c.)

Otherwise, if the disjunctive does not give liberty to do the one thing or the other. 1 Rol. 450. l. 50. 451. l. 5. Semb. 3 Mod. 232.

[*]And if a man covenants or promises to do a certain thing at a certain time, and it becomes impossible by the act of God, he shall not be excused. 1 Rol. 450. l. 20. Vide Action upon the Case upon Assumpsit, (G).

(D 2.) What shall be said impossible.

If a condition be to do a thing which by no means can be done, it shall be said to be an impossible condition; as, to go from London to Rome in three hours. 1 Rol. 240. l. 10.

To assign a commission of bankrupts; for the commission cannot be assigned. R. 1 Rol. 419. l. 50.

But if the condition be improbable, and out of his power to do, yet it shall not be said to be impossible.

As, if the condition be that a married man shall marry such a woman; for it is possible that his present wife may die before him, and the other woman. 1 Rol. 419. l. 45.

That the pope shall be in London within a day. 1 Rol. 420. l. 8.

[*99]

That he will indemnify against B. upon an obligation by A. to C. though it does not appear that B. is concerned. 1 Rol. 420. l. 20.

So, though it be out of human power; as, that it shall rain to-morrow; for it is possible. 1 Rol. 420. l. 5.

(D 3.) If a condition be contrary to law; in a feoffment, gift, &c.

So, if a condition precedent to a feoffment be illegal, or repugnant, the estate can never vest.

If a condition subsequent to a feoffment be to do a thing which is *malum in se*, the condition shall be void, and the estate remains absolute; as, a condition to commit murder, or robbery, &c. Co. L. 206. b.

So, if a condition upon a feoffment, &c. be to do a thing contrary to the obligation or rule of law; as, a feoffment upon condition, that a daughter shall inherit, and not a son. 1 Rol. 418. l. 42. (h)

(D 4.) Or repugnant.—To the grant.

So, if it be repugnant to a grant; as, a feoffment, &c. upon condition that he shall not take the profits; the estate remains absolute, and the condition is void. C. L. 206. b. 7 H. 6. 43. b.

A warranty, upon condition that it be void. 1 Rol. 419. l. 20.

So, a general warranty, upon condition that he shall not have in value; yet he may rebut, and then it is not wholly defeated; but he might rebut without the words (against all men), and therefore they are defeated. 1 Rol. 419. l. 25.

So, a grant by a bishop rendering rent to him and his successors, and if it be not paid to the chapter in the vacation, that it shall be void; the condition is repugnant, and therefore void. R. Mo. 52.

So, a lease to A. upon condition that he shall not take the profits for two years. 2 Leo. 132.

[*]Or, to A., B. and C., upon condition that if C. takes the profits during the lives of A. and B., his estate shall cease. Ibid.

(D 5.) To the estate.

So, if a condition upon a feoffment be repugnant to the nature of the estate; as, a feoffment, upon condition, that the feoffee shall not alien; the estate is absolute, and the condition void. Co. L. 206. b. 223. a.

So, if a grant, release, confirmation, or devise in fee be made, upon such a condition. Co. L. 223. a.

So, if a term for years, or chattel real or personal be granted or assigned, upon such a condition. Co. L. 223. a. Semb. cont. 223. b.

So, a feoffment or gift in tail, upon condition, that the wife shall not be endowed, or the husband shall not take by the curtesy; the condition is void. 1 Rol. 418. l. 25. Co. L. 224. a.

So, a gift in tail, upon a condition, that the donee shall not levy a fine, or suffer a recovery, or make a lease within the stat. 32 H. 8. the condition is void. R. 6 Co. 41. 10 Co. 38. b.—Cont. as to the lease, Co. L. 123. b. acc. as to the fine and recovery, Co. L. 224. a. Hob. 170. Vide infra.

[So, a condition that if tenant in tail suffer a recovery to bar the remainders, he shall pay a sum of money to the remainder-man, is void, as being repugnant to the estate. Ambler, 379.]

(h) A condition that a lease shall be void if the lessee becomes bankrupt is good. 2 T. R. 133.
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So, a condition to a gift in tail, that the donee shall not be bound by a collateral warranty. 10 Co. 39.

Or, that the donee after possibility shall be punished for waste. Ibid.

Or, that the donee shall not make a grant for his own life. 6 Co. 43.-a. Cont. Co. L. 223. b.

Or, that the donee shall not levy a fine within the stat. 4 H. 7. 1 Rol. 418. l. 30. Otherwise of a fine at common law. Ibid. l. 39. Vide supra.

So a condition, that the donee shall not effectually go to alter, &c. for an attempt, without more, is not effectual; and if an act effectual is done, the estate is gone to another. R. Jon. 59.

So a lease to A. and his assignees, upon condition that he shall not alien. Hob. 170. -

Or that he shall not use such a room, or part; for it is not excepted. Ibid.

(D 6.) What shall not be repugnant.

But a feoffment, upon condition that the feoffee shall not alien to such a particular person, is not repugnant; for his alienation is not totally restrained. Lit. s. 361.

Or that he shall not alien in mortmain. Co. L. 223. b.

So a condition to a feoffment before the stat. *quia emptores terrarum*, is good, that he shall not alien without licence. Co. L. 223. a.

Or by the lord, that he shall not alien generally. Semb. Co. L. 223. a.

And now, since the stat. such a condition to a feoffment by the king is good; for he may reserve a tenure to himself. Co. L. 222. a.

[*]A feoffment, upon condition that he shall not alien other land, is good now. Ibid.

So a condition to a gift in tail, that he shall not alien in fee, or *pur autre vie*, is not repugnant; for such alienation, without a recovery, will make a discontinuance. Lit. s. 362. 1 Rol. 418. l. 35. 21 H. 7. 11. 6 Co. 41. b.

So if such condition be, where the gift is to A. in tail remainder to him in fee. R. 11 H. 7. 6. b.

So a feoffment to husband and wife, upon condition that they shall not alien, restrains an alienation, except by fine. Co. L. 224. a. 6 Co. 41. b.

A feoffment to an infant, upon such condition, is good to restrain an alienation during his infancy. Ibid.

So such a condition, in a feoffment to an ecclesiastical corporation, is good. Co. L. 224. a.

So if a lease to commence at a future day be, upon condition to be void, if the lessee dies before the commencement or before the end of term, it is not repugnant. R. 1 Rol. 418. l. 50.

[So a condition in a lease for 21 years, that the landlord shall re-enter, on the tenant's committing any act of bankruptcy, on which a commission shall issue, is not repugnant. 2 Term Rep. 133.]

(D 7.) If a condition be contrary to law; in obligations, &c.

If a condition of an obligation be to do a thing which is *malum in se*, the condition and also the obligation is void: as if an obligation be with condition to kill another. Co. L. 266. b.

To maintain, and use such a one as his wife, who is the wife of another. R. Mo. 477.

[Bond from A. to B. reciting they had agreed to live together, A. to maintain B. and leave her annuity of 60*l.* if he quits her, or she outlives him; if she leaves him, he is not to maintain her any longer, or leave the annuity; the bond is illegal and void; it is not *premium pudicitiae*, but *premium prostitutionis*. 3 B. M. 1568.]

A covenant by a husband to pay to trustees a certain annual sum by way of separate maintenance for his wife in case of their future separation, with the consent of such trustees, is not illegal. 2 East, 283.]

So if the condition be, to enlarge him out of prison, or suffer his escape. R. Hob. 14. R. Hard. 464.

So if the condition becomes impossible by the act of God, of the law, or of the obligee, the obligation shall be saved. R. Mo. 855. Vide ante, (D 1.)

So if the condition be to perform covenants which are void by statute, or by law. Vide Covenant, (F).

(D 8.) Otherwise, if contrary to a maxim of law, or repugnant.

But if the condition of an obligation, &c. be only to do a thing contrary to a maxim of law, or repugnant to the nature of the grant or of estate, the obligation is good; for he may do it, if he will forfeit his obligation.

As if an obligation be, with condition to make a feoffment to his [*]wife; though it cannot be by the rule of law, the obligation is good. Co. L. 206. b.

To do an act, which will be maintenance. 1 Rol. 417. l. 45.

So if an obligation be, that the feoffee shall not take the profits of his estate. Co. L. 206. b.

Or that the feoffee shall not alien. Ibid.

So if the condition of an obligation, &c. was impossible at the making, the obligation is single. 2 Leo. 189. 5 Lev. 74. Vide ante, (D 1.)

So if it be to perform covenants in an indenture, &c. which becomes void by rasure, &c. 1 Leo. 282.

Yet if the condition be part of the obligation, and incorporated with it, if that becomes impossible, the obligation shall be void; as, if the condition of a recognizance by bail be impossible. 1 Sal. 172. (i)

{ It is true as a general rule, that a condition annexed to a devise for life, whereby it is to be divested by the marriage of the devisee, is void, it being in restraint of marriage; but it seems, that the condition will be effectual if the particular devise be expressly limited over to take effect, immediately, upon the marriage. Parsons v. Winslow, 6 Mass. Rep. 169. Vide Hawley v. Northampton, 8 Mass. Rep. 3.

So a condition annexed to a devise, that the devisees shall not take unless they continue to inhabit a certain place, is void. Newkerk v. Newkerk, 2 Caines' Rep. 345.

So a perpetual restriction of alienation, after a conveyance in fee, is void. M'Williams v. Nisly, 2 Serg. & Rawle, 513. }

(E) CONDITION EXPOUNDED.

When liberally.

The words of a condition shall be liberally expounded to serve the intent

(i) A condition in an insurance from fire that the assured shall procure a certificate from the ministers, churchwardens, and some reputable inhabitants, of his character and circumstances, and of their belief that the loss was without fraud, is binding. 1 H. B. 254.

of the parties ; as, if the condition of an obligation be, whereas A. will surrender a copyhold to B. if they so long live, then the obligation shall be void ; it shall be part of the condition, that A. make the surrender. R. 1 Rol. 409. l. 30.

So a condition, that if A. discharge a recognizance, and whereas he hath agreed to free the obligee from two bonds, the condition is, that if A. save him harmless from the said two bonds, then, &c. it extends to the recognizance, as well as to the two bonds. R. 1 Rol. 409. l. 40.

If the heir confirms the grant of his father as to a walk in a forest, &c. and by the same indenture grants another walk, upon condition that he do not cut trees in *aliqua parte præmissorum* ; if he cuts in the part confirmed, it is within the condition. R. 1 Rol. 422. l. 20.

If a man promises, that he will not discharge A. out of execution without the consent of B. and afterwards he releases the execution, upon which B. recovers against him in assumpsit ; an obligation by A. to indemnify him against all suits which may arise upon this release, extends to this assumpsit. R. 1 Rol. 422. l. 30. 431. l. 45. Vide post, (l.)

If a condition be, to assure lands discharged of all prior incumbrances, except a lease for years upon the ancient rent ; if he assures, but before that, and after the condition, he makes a lease for years upon the ancient rent, it is no breach. 1 Rol. 433. l. 30.

If a condition be, to re-enter if no distress be found ; this shall be expounded of a reasonable distress ; and therefore if a locked cupboard remains there, he may enter. R. 1 Rol. 428. l. 35.

To perform all articles in the indenture, does not extend to land excepted out of the lease, though it be mentioned in the indenture. R. 1 Rol. 431. l. 25.

If a condition be, that if he dies without issue, he by his deed or [*]will shall give land to B., it shall be understood, that he shall make such settlement or disposition in his lifetime, which shall take effect, if he dies without issue. R. per three J. Jon. 180.

If a condition be, to re-pay 500*l.* of the portion, if his wife dies, within two years after the marriage without issue ; if she has issue, he is not bound to repay, though the wife and also the issue die within two years. R. 1 Sid. 102.

If a condition be, that the lessee shall not assign without the assent of the lessor ; he cannot give, grant or sell, for those are assignments. Mo. 11.

If a condition be, to deliver so many shoes to A. a common carrier, for the use of the obligee ; a delivery to the porter of A. is sufficient, for the master shall be bound by it. R. 2 Mod. 309.

If a condition be, that there is no incumbrance but an estate for life ; an estate for the life of B. where his wife by the custom has free-bench, is not a breach, 2 Ver. 45.

If a condition be in a lease by two lessors, that the lessee shall enjoy without disturbance or incumbrance made by them ; a lease by one lessor will be a breach. R. Lat. 161.

If a condition be, that the lessee shall enjoy ; this shall not be extended to tortious acts ; and therefore, if he be disturbed without title, it is not a breach of the condition. R. 1 Rol. 430. l. 35.

So though the words are express, that he shall enjoy without the interruption of any. Semb. cont. 3 Leo. 44. [Com. Rep. 230.]

So in covenant. R. Jon. 197.

[*103]

If a condition be, to save harmless concerning the buying of goods at such a price; it extends to the title of the goods, not to the price. R. Al. 95.

If a condition be, that he shall not molest A. in his lands or goods upon any account; for it shall be intended of a tortious molestation. R. Cro. El. 705.

So a condition shall not be construed to extend to things of common right. R. 1 Rol. 434. l. 20.

As if a condition be, that A. shall enjoy such land immediately upon his death; and at his death the land was sown with corn, and his executor takes the emblements; the condition does not extend to it. R. 4 Leo. 1.

[If a man binds himself by bond to leave his children jointly 200*l.* and leaves four children, and by will gives the eldest son land worth more than 50*l.* and to the other three 50*l.* a-piece, payable at twenty-one; this is not performance. 1 Wils. 280.]

(F) TO WHAT IT EXTENDS.

If a devise be to A. in tail, remainder to B. in tail, upon condition, that he, they, or any of them shall not discontinue, &c. the condition extends only to the remainder. 1 Rol. 422. l. 5. R. 5 Co. 68. Vide ante, (A 10.)

A gift to A. in tail, remainder to him in fee, upon condition, that he shall not alien, extends only to the estate-tail; for it is repugnant to the fee. Co. L. 224. a.

So a lease, upon condition, that the lessee or his assigns shall not [*]alien, unless to his brother; if the lessee assigns his term to his brother, he shall not be restrained by the condition. R. 1 Rol. 422. l. 10. Vide post, (Q).

That the lessee shall not sell, &c. without the assent of the lessor; the executor of the lessee, after the death of the lessor, may sell. Dy. 65. b. Mo. 11.

(G) CONDITION PERFORMED.

(G 1.) By whom it may be.—For and against whom covenant lies.

If a feoffment be upon condition, that the feoffor pay so much at such a day, and before the day he dies, the heir may pay it; for he has an interest in the land, and the feoffee has the same advantage if the payment be by the heir, as if it were by the feoffor himself. Lit. s. 334. Vide Covenant, (B 1, &c.—C 1, &c.)

So, a fine to the use of A. in fee, but if B. pays so much before Michaelmas to A. for life, and to B. in fee, B. dies before Michaelmas, his heir may pay. Dub. 1 Rol. 420. l. 45.

If a devise be to a wife for life, and after to A. his son in fee, with a proviso, that if B. pays 500*l.* to A. within three months after the death of the wife, B. shall have it to him and his heirs; B. dies before the wife, his heir may pay. R. Eq. Abr. 107. Marks v. Marks, M. 5 G. Str. 129.

So, an executor or administrator may pay. Lit. s. 337. Co. Lit. 209. a.

Or the ordinary, if there be no executor or administrator. Co. L. 209. a.

So, if the heir be within age, his guardian may pay in respect of his interest. Co. L. 206. b.

So, every one, who has an interest in the condition, or in the land, may perform the condition; as, if a feoffee, upon condition to pay at Michael-

mas, enfeoffs another before Michaelmas, the second feoffee may pay. Lit. s. 336.

So, the feoffee himself, after his feoffment to the other, may pay. Ibid.

So, a servant by the command of the feoffee may pay. 1 Rol. 421. l. 47.

So, if an heir be an idiot, a stranger may pay for him. Co. L. 206. b.

So, if a stranger, in any case, pay in the name, and without the privity of the feoffor or his heir, and the feoffee accept it; it will be a good performance. Co. L. 207. a.

So, if two be enfeoffed, upon condition to re-enfeoff him for life, remainder in fee to B. and one re-enfeoffs him; it shall be good for a moiety, though the condition be entire; for by his acceptance, the feoffor dispensed with the condition. Dy. 69, 70.

But if a stranger, of his own head offers to perform a condition, the feoffor need not accept it. Lit. s. 334.

So, if a condition be, that the feoffor pay, without limiting a time for [*]payment; the heir, &c. cannot pay, for the feoffor had time only during his life. Lit. s. 337.

(G 2.) To whom it ought to be performed.

If a condition be, to pay, on such a day, money to A. his heirs or assigns; it may be paid to any one named in the condition: and therefore, the money may be paid to the heir of the feoffee, after his death; though he has an executor to whom the money belongs. R. 5 Co. 96. Vide Chancery, (4 A 9.)

So, it may be paid to the heir, after assignment by the feoffee. R. 5 Co. 96. 1 Rol. 421. l. 5.

So, if a condition be, to convey to A. his heirs and assigns, and A. dies, the conveyance shall be to his heir. Semb. Jon. 181.

So, if the feoffee assigns all his estate, the payment may be to the feoffee himself, or to his assignee; for the words of the condition give him an election to pay to the one or the other. Co. L. 210. a.

And after the death of the feoffee, the payment may be to the heir or assignee. Ibid.

So, if a condition be, to pay to A. his heirs or executors; the payment may be to the heir or executor, at the election of the feoffor. Co. L. 210. a.

If it be, to pay to the feoffor, his heirs or assigns, it may be to the heir or executor; for he is an assignee in law, and there cannot be any other assignee of a bare condition. Co. L. 210. a. 5 Co. 97. a.

If a condition be, to lease to A. or his assigns; he ought to lease to those whom A. names, for he cannot have other assigns. R. 1 Rol. 421. l. 20.

If a condition be, that he pay to the feoffee, without more, on such a day, and he dies before the day: the payment ought to be only to the executor or administrator, and cannot be to the heir. Lit. s. 339.

So, the payment may be to any deputed by the feoffee. 1 Rol. 421. l. 50.

If a condition be, that he pay to the feoffee, his executors or assigns; payment to any executor is sufficient. Per Manw. 3 Leo. 103.

And it is safer to pay to an executor, though within age, than to an administrator *durante minore ætate*. R. 3 Leo. 103.

But, if a condition name any to whom the payment shall be, it cannot be paid to another: as, a feoffment upon condition, that he pay to the feoffee or his heirs; the payment ought to be to the heir, and cannot be to the executor. Lit. s. 339. Co. L. 210. a. R. 5 Cq. 96. b. 97. a.

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So, it cannot be paid to an assignee, for he is not named. R. 5 Co. 96. b. 1 Rol. 421. l. 10.

So, if a condition be, to pay to the feoffee, his heirs or assigns, and the feoffee grants for life or years; the payment cannot be to the grantee; for no assignee is intended, who has not an assignment of all his interest, viz. in fee, in tail, or for life with remainder in fee. R. 5 Co. 97. a.

So, if the feoffee makes his executor, the payment cannot be to him; for an assignee in law shall not be intended, where there may be an assignee in fact. R. 5 Co. 97. a. Co. L. 210. a.

[*]If a condition be, to pay to such whom the obligee shall name by his will, and he does not name any; the payment shall not be to his executor, for there ought to be an express nominee. R. 1 Rol. 422. l. 25.

**(G 3.) At what time.—When he has time during his life.
Though there be a request.**

If a condition upon a feoffment, obligation, &c. be to do a single act, or labour, which concerns himself only; he shall have time to do it during his life. Co. L. 208, 9.

And shall not be bound to do it upon request. Co. L. 209. a.

As, if a feoffment, obligation, &c. be upon condition, that the feoffee, obligee, &c. go to Rome, Jerusalem, &c. the feoffee has time to go, during his life. Ibid.

Or, that a stranger go to Rome, &c. Ibid.

So, if a condition be to do an act, without limiting any time; he who has benefit by it may do it at what time he pleases: as, if a condition of a feoffment be, that upon payment of 10*l.* the feoffor may re-enter, he may pay it when he pleases. Pl. Com. 16. a.

**(G 4.) When he has time during his life.—Unless where
hastened by request.**

If a condition be to do a local thing to the feoffor or obligee himself, he has time during life, unless he be hastened by request; as, if a feoffment or obligation be upon condition, that he re-enseoff the feoffor or obligee. Co. L. 208. b. 1 Rol. 438. l. 15. 40. Co. L. 219. a. 220. a.

So, if it be that he re-enseoff the feoffor, and a stranger. Co. L. 219. b.

Or, re-grant to the feoffor in tail, remainder to a stranger. Ibid.

So, if a devise be to A. upon condition that she marry B., time shall be allowed to A. to marry at any time during her life. Per Holt, Skin. 320.

So, if a devise be upon condition, that A. marry him before her age of 21 years, and B. dies before such age; A. shall have the land till her age of 21 years. Ibid.

(G 5.) When to be performed immediately.

But where a condition is to do a transitory thing without limiting any time, it ought to be done immediately, viz. in convenient time; as, an obligation to pay money, to deliver charters, &c. Co. L. 208. a. 1 Rol. 436. l. 15 to 35.

An obligation to deliver up an obligation in which A. and B. are bound. R. 6 Co. 30. b.

A devise upon condition to pay debts; they ought to be paid in convenient time. 1 Rol. 437. l. 20.

Or, to sell for payment of debts. 1 Rol. 437. l. 25.

To find security for payment. R. 1 Rol. 438. l. 25.

If a man be bound to make further assurance, &c. he ought to execute it immediately when required, without taking time to advise with [*]counsel. 1 Rol. 440. l. 5. 15. 441. l. 30. 45. Per two J. Barkley cont. Jon. 314. Vide post, (H).

So, if a condition be to do a local thing, which may be done in the absence, and without the concurrence of the obligee, it shall be performed immediately: as, an obligation, that he acknowledge satisfaction upon record in B. R. Co. L. 208. b. 1 Rol. 436. l. 30.

So, if a condition be to do a thing transitory or local, to a stranger: as, to pay money to a stranger. Co. L. 208. b. 1 Rol. 437. l. 15. 438. l. 5.

To enfeoff a stranger; he ought to do it immediately, for otherwise the stranger will lose the profits in the meantime. Co. L. 208. b. 1 Rol. 439. l. 30.

Otherwise, if the king has land upon such condition. Dy. 139.

Or, if it be, to the stranger in tail, remainder to the feoffor. 1 Rol. 438. l. 22. Cont. Co. L. 219. b.

So, if a condition be to do a local thing to the feoffor, or obligee himself, it ought to be done immediately, where the intent of the parties will be otherwise frustrated: as, an obligation to grant an annuity to the obligee, for his life, to be paid annually at Easter; it ought to be granted before Easter, otherwise it cannot be paid annually at Easter during his life. Co. L. 208. b. 1 Rol. 439. l. 15.

If A. promises to sell a lease of tithes made to B. for his life, and by him assigned to A., and to pay the money raised by the sale, or otherwise to re-deliver the assignment; he ought to do it in convenient time, and has not time to sell during his life; for then perhaps by the death of A. the lease will expire. R. 1 Rol. 436. l. 40.

So, a promise to procure the king's grant of a ward, shall be done in convenient time; for otherwise the profits in the mean time will be lost. R. 1 Rol. 437. l. 40.

So, if a feoffment be made, upon condition to give back the advowson to the feoffor for his life; it ought to be given back before an avoidance happens. R. 2 Co. 78. b. Co. L. 222. b.

If a covenant be to make a lease to B. who shall pay 20*l.* as a fine; B. ought to request the lease in a convenient time. R. Bridg. 41.

But where a condition is to be performed immediately, he shall have a reasonable time to perform it, according to the nature of the thing to be done. Vide post, (H.) 1 Rol. 449. l. 12.

So, if it be to be performed upon demand. 1 Rol. 449. l. 12. 443. l. 17.

But if he refuses upon demand, it is broken, though he performs it within a reasonable time afterwards. 1 Rol. 449. l. 15.

If a condition be to make an obligation immediately by the advice of B., he shall have a reasonable time to obtain the advice of B. 1 Rol. 443. l. 15.

{ Where a prompt performance of a condition is necessary to give the feoffor the whole benefit contemplated, or where its immediate fruition formed the motive for entering into the agreement, the feoffee shall not have his whole life for performance, but only a reasonable time. Hamilton v. Elliot, 5 Serg. & Rawle, 384. }

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(G 6.) How a condition shall be performed where the time is limited. What shall be the time intended.

If upon a writ returnable *die lunæ prox. post cras. Trin.* an arrest be on the last day, and an obligation of the same date, to appear *die lunæ prox. post cras. Trin.*, he ought to appear the same day. Dub. 1 Rol. 444. l. 30.

[*] If a condition be to pay at Michaelmas without more; he ought to pay at the next Michaelmas. R. 1 Rol. 444. l. 50.

If a condition be, to pay A. D. 1599, upon the 12th of October next after date; it shall be paid the 12th of October, anno 1599, though that be not the October next after date: for the intent appears, that it be paid anno 1599, and the subsequent words shall be construed to stand with the precedent; or if they cannot, they shall be void. R. 1 Rol. 444. l. 40.

If an obligation, dated 17th November, 12 Jac. be, upon condition, to pay the 21st November ensuing 5*l.* and 5*l.* more on the 20th of December next after; the first 5*l.* shall be paid on the 21st of November, 12 Jac. for ensuing refers to the day, not to the month. R. 1 Rol. 442. l. 20.

If a condition be, to pay when A. comes to his house 10*s.* and 10*s.* at Mich. and 10*s.* at St. Andrew then next; the payment of the latter sums ought to be at the next Mich. and St. Andrew; and not at those feasts after A. comes to his house. 1 Rol. 442. l. 25.

If a condition be, to pay *citra, infra, vel ante festum*, it ought to be paid before the feast-day. 1 Rol. 442. l. 30.

But if it be *in festo*, it ought to be paid upon the feast-day. 1 Rol. 442. l. 35.

If a condition be, to pay within forty days after a ship returns from her voyage to the port of D. or to another port where the goods are unladen, the ship returns to the port of P. and there unlades; payment ought to be in forty days after the arrival, and not after the unlading; for that is but the description of the other port. R. 1 Rol. 442. l. 40.

[In debt on bond, the condition whereof reciting, "that a marriage was intended between A. and B. but at B.'s request to be deferred to her father's death; that A. and B. had mutually engaged not to intermarry but with each other; in consideration thereof, and for provision for A. if said marriage should not take effect, and that B. should intermarry with any other person, or die before the marriage, or refuse to marry A. on her father's death, B. had agreed that A. in either of the cases aforesaid should have 1200*l.* of her fortune, and 5*l.* per cent. interest from the date; now, if B. within a month of her intermarriage with any person but A. or within a month after her father's death, pay A. 1200*l.* and 5*l.* per cent. interest from the date, or her heirs, &c. within a month of her death pay A. 1200*l.* then, &c." and B. afterwards marries another man in her father's lifetime, the bond is forfeited, and the money then payable, for the law will supply the words, which shall first happen. Semb. Wils. 59.]

{ It seems, that performance of a condition precedent, on a different day from the time limited, is no compliance therewith, though the act be performed to the acceptance of the party. Stutevill v. Miles, 2 Marsh. 428. }

(G 7.) It may be performed before the day limited.

If a condition be to pay money at such a day, it is sufficient if it be paid before the day, if the party accepts it; for that amounts to payment upon the day. R. 1 Rol. 440. l. 30. 35. 473. l. 30. Co. L. 212. b.

So, if it be to enfeoffe such a one at a future day ; it is sufficient if he enfeoffe before the day. 1 Rol. 440. l. 40.

Or, to enfeoffe after the death of A. and he enfeoffs in his lifetime. 1 Rol. 440. l. 45.

If it be to pay at or before such a day ; he may pay at any time before, [*]if he comes to the obligee, or meets him at the place appointed for payment. R. Cro. El. 14.

But payment before the day will not give a collateral advantage and therefore, if a condition be, upon payment on the 1st of May to re-enter ; if he pays before, he cannot re-enter till the 1st of May. R. 1 Rol. 473. l. 30.

(G 8.) Or at the last part of the day.

So it is sufficient, if it be performed at the last part of the time limited : as if the parliament enacts, that A. shall be convicted, if he does not surrender himself within a quarter of a year ; it is sufficient, that he be surrendered on the last day of the quarter. 1 Rol. 442. l. 15.

If a condition of an obligation be to pay at or before 29th Sept. next ; a tender shall not be good without notice, unless it be upon the last day, viz. 29th Sept. R. Cro. El. 14.

And a tender may be the last instant of the day. Adm. Mo. 122.

An obligee, &c. to whom a condition is to be performed, need not attend the whole day. Vide 1 Rol. 443. l. 7.

(G 9.) In what place it shall be performed.

If a condition of an obligation be to pay money to the obligee, at a day certain, without limiting any place ; the obligor is to seek out the obligee if he be within the realm. Lit. s. 340.

So, if a feoffment be upon such condition ; for it is a sum in gross, and collateral to the land. Lit. s. 340. 1 Rol. 445. l. 30 ad 40.

So, if a condition be, that a stranger shall shew a deed to his counsel upon request ; after request made, the stranger ought to seek out his counsel. 1 Rol. 443. l. 35.

But if a condition be, to deliver a weighty thing, as corn, timber, &c. the obligor, before the day, ought to enquire where the obligee will appoint the delivery. Co. L. 210. b. 4 Leo. 46.

If a condition be to pay rent ; it is sufficient, that it be tendered, or paid, upon the land. Co. L. 210. b.

And it may be tendered upon the land, though he be bound by covenant to pay. 1 Rol. 443. l. 52.

Or, bound under a penalty to pay. 1 Rol. 444. l. 2.

So, if a condition be to pay, &c. at a place certain, without limiting any certain time ; the party ought to give notice to the obligee of the time when he will pay. Co. L. 211. a. 3 Co. 92. b. 1 Rol. 449. l. 5.

Or, if he meets the obligee or feoffee at the place at any time, he may pay. Co. L. 211. a.

Or, if the obligee receives the money at another place, it is sufficient, though he need not. Co. L. 212.

So, if a condition be, that a stranger make a feoffment, or do another act to a stranger at such a day ; he who is to make the feoffment ought to give notice to the feoffee, and request him to be upon the land. Co. L. 211. a.

If a condition be to do an act at such a place upon request, the request may be in any place; as, to deliver at Rotterdam *super requisitionem* [*] *de eodem*; the request in any other place, to deliver there, is good. R. 1 Rol. 443. l. 20.

If a place certain be limited for payment, he is not bound to pay at another place. 1 Rol. 445. l. 52. 444. l. 7.

Neither need the other accept it in another place. 1 Rol. 446. l. 5. 10. 444. l. 10. Lit. s. 343.

But acceptance at another place is sufficient. Lit. s. 343.

(G 10.) How a condition shall be performed.—All incidents.

If a condition be to do a thing; he ought to do all that which depends upon the performance. 1 Rol. 422. l. 45. How performance shall be pleaded, vide in Pleader, (C 58, &c.)

As, if a condition be to stand to an award concerning a partition; if it awards a partition, and that he levy a fine for confirmation, he ought to levy the fine; for it depends upon the partition, and enforces it. 1 Rol. 433. l. 47.

(G 11.) Strictly performed.

So, he ought to perform it strictly; as, if a condition be to enter a *retraxit*, and he discontinues; it is not a performance. 1 Rol. 426. l. 32.

To appear at the suit of such a one in B. R. and he appears there the same term in another suit; though this be an appearance in law, it is not a performance. R. 1 Rol. 426. l. 40. { Vide Mouncey v. Drake, 10 Johns. Rep. 27. }

To pay to the obligee; payment to his wife, without more, is not a performance. R. Rol. 427. l. 10.

To enfeoff one, and he enfeoffs him and others. 1 Rol. 427. l. 45.

That two shall enfeoff, and one enfeoffs the whole. 1 Rol. 421. l. 45.

(G 12.) According to the intent.

So, if a condition be, that it shall be lawful for the lessee to enjoy; if the lessor enters upon him wrongfully, it is a breach; for the intent was, that the lessor should not interrupt him. R. 1 Rol. 427. l. 15. R. Cro. El. 544. Vide ante, (E). Vide post, (M 1.)

That the lessee shall not parcel out his land from the house; if he leases to another the house and part of the land, and afterwards leases the other part, it is a breach. R. 1 Rol. 427. l. 20.

That he assure land which was bargained and sold to him; though the bargain and sale were void, yet he ought to assure the land, which was pretended to be bargained. R. 1 Rol. 427. l. 30.

That he acquit him; if he gives an acquittance, but does not acquit him in fact, it is not sufficient. 1 Rol. 433. l. 43.

That he enjoy without damage for want of warranty: if he does not render in value upon the warranty, is not sufficient. 1 Rol. 433. l. 37.

That he shall not alien: and he gives to his son. 1 Rol. 433. l. 50.

If a recognizance be, upon condition to try an indictment the next term, and a trial is had, but the verdict quashed for a defect in the *venire facias*: the recognizance is forfeited, for it ought to be an effectual trial. R. Mod. Ca. 179.

[*](G 13.) Ought to be performed bona fide.

So, a condition ought to be performed truly and bona fide, and not colourably : and therefore, if it be agreed, that the money shall be paid at the day limited by the condition, but shall be returned immediately to him who pays it, the condition is not performed. Co. L. 209. b.

If a condition be, *quod licitum foret* to A. to see all the accounts of the testator, and one of the executors refuses to shew them, and the other, who was bound with such condition, says that he does not deny it : it is not a performance, for he ought to shew all the accounts. R. 1 Rol. 431. l. 5.

(G 14.) But it is sufficient, if it be performed in substance.

But it is sufficient, if the substance of the condition be performed. Vide 1 Rol. 426. l. 8.

If a condition be, that he suffer the lessee to enjoy without the interruption of any : an entry of a stranger by an elder title is not a breach, for the word, suffer, is passive. 1 Rol. 425. l. 45.

So, a condition, that he permit land to descend : though his son is outlawed, and cannot take. R. 1 Rol. 426. l. 5.

That he deliver letters patents : and he delivers an exemplification of them. 1 Rol. 426. l. 10.

That he enfeof : and he conveys by lease and release. Semb. 1 Rol. 426. l. 12. Co. L. 207. a.

That he grant the reversion : and he enfeoffs, and the tenant re-enters. 1 Rol. 426. l. 15.

That he give licence to carry goods : and the party is disturbed by a stranger. 1 Rol. 426. l. 25. 20.

That he withdraw his suit : and he discontinues. 1 Rol. 427. l. 5.

That the lessee may enjoy without molestation, and a rent-seck is issuing out of the land : it is not a breach, for the possession is not incumbered with it. 1 Rol. 434. l. 15.

And if the rent-seck be to the queen, who may distrain of common right by her prerogative : it is not a breach, for he is not bound to discharge things of common right. R. 1 Rol. 434. l. 20. Vide ante, (E).

A condition that he pay to A. and other parishioners of B. ; if he pay to A. and two others it is sufficient. R. Mo. 68.

If A. be bound by recognizance to perform the will of B. and to satisfy all bequests according to his true intent, who devised lands held *in capite* to C. in fee : if the heir enters for the third part, it is not a breach.

[A note for payment of money on a South-Sea contract, is a performance or composition as well as a bond. *Fotheringham v. Mozato*, P. 1722, Bunb. 108.]

(H) Condition to make assurance.

If a condition be to levy a fine, or make an assurance, without saying at whose charge : it shall be at the costs of him who is bound to do it. 1 Rol. 422. l. 50.

And the obligor ought to sue a writ of covenant for the fine, in the [*]name of the obligee. 1 Rol. 422. l. 52: Cont. 1 Rol. 458. l. 40. D. cont. 5 Co. 127. a.

If a condition be to make assurance, he ought to make an effectual assurance : and therefore, if it be to make a scoffment, a charter of scoffment, [*111] [*112]

with a letter of attorney to make livery, is not a performance, if livery be not made. 1 Rol. 425. l. 35.

To surrender a copyhold, is not performed by a surrender to copyhold tenants, if it be not presented at the next court. R. 1 Rol. 425. l. 20.

If a man bargains and sells land by indenture, and covenants to make a good estate before Christmas next : an inrolment of the indenture before is not sufficient, but he ought to levy a fine, make a feoffment, &c. R. 3 Leo. 1. Bend. pl. 62. And. 27.

If a covenant be to make assurance, &c. he ought to do every thing that is necessary to be executed by him, though without some other act, as livery, inrolment, &c. the assurance is not complete. R. 1 And. 56.

But if a condition be to make such a release, &c. as A. shall direct; if he executes that which A. directs, it is enough, though it be not sufficient. D. 5 Co. 23. b.

So if it be to make a sufficient estate by the advice of A., who advises that which is not sufficient. 5 Co. 23. b.

So it ought to be an absolute assurance; for if a man be bound to make an absolute assurance of a copyhold, a conditional surrender is not a performance. R. 1 Rol. 425. l. 10.

So if he be bound to make assurance, generally. 1 Rol. 425. l. 15.

If a condition be to make a conveyance of such land, or, to assure such land : he ought to make any conveyance or assurance that shall be required.

So if it be to do all acts for assuring. Yel. 45.

And if a conveyance, generally, be required, he ought to execute some sort of conveyance. R. Yel. 45.

If a fine, or bargain and sale, be afterwards demanded, he ought to do it : for he is bound to do all acts *toties quoties* he shall be required. Ibid.

If a note of a fine to be acknowledged before a judge of assize be required; he ought to do it, though a writ of covenant is not depending; for it is preparatory. R. Mod. 810. 2 Cro. 251.

If a common recovery be required; he ought to do it. 1 Rol. 427. l. 25.

If he be to make assurance at the costs of the obligee; he ought to make, though not necessary, all the assurances required. Per two J. Mo. 570.

If the condition be to make such assurance for money as counsel shall devise, and he devises an obligation of 1000*l.* for payment of 100*l.*, he ought to execute it. 1 Rol. 423. l. 25.

Otherwise, if it be to make such reasonable assurance. 1 Rol. 423. l. 30.

If it be to make an obligation, and he tenders an obligation which binds his heirs; he ought to execute it. 1 Rol. 424. l. 32.

If there be a receipt for purchase-money contained in it; he ought to execute it. Dub. Mo. 367.

If a condition be to assure to such an one as B. shall name; an assurance [*]to B. himself is good; for his acceptance is a nomination of himself. 1 Rol. 424. l. 10.

To assure to B. and his heirs; if B. dies, it shall be made to his heir; for the copulative shall be construed in the disjunctive. R. 1 Rol. 450. l. 50.

But if the condition be to make an assurance or conveyance, and a warranty or covenant be in the deed; he is not bound to execute it. 1 Rol. 424. l. 37. R. 2 Cro. 571. 2 Rol. 191. R. 1 Leo. 29. Dub. 1 Sid. 467. R. 1 Mod. 67. Per two J. And. cont. 2 Leo. 130. Per Co. 1 Rol. 71.

So he is not bound to execute an obligation, or statute for enjoyment ; for that is not an assurance. 2 Cro. 115.

Yet a conveyance with reasonable covenants he ought to execute. Cont. 2 Cro. 571. Acc. Ray. 190. 1 Mod. 67.

So though a condition be to make such assurance as counsel shall advise, and the counsel advises an obligation. 1 Rol. 423. l. 10. 2 Cro. 115.

So if it be such assurance of an annuity as counsel shall advise, and he advises an obligation. Dub. 1 Rol. 423. l. 20.

Otherwise, if, all acts for assurance which counsel shall devise. Per Poph. 1 Rol. 423. l. 15.

So if it be all reasonable acts for assurance. R. Yel. 45.

So he is not bound to execute an assurance, which contains more than the condition ; as, a fine of four houses, where the condition was for two only ; though the use of the other two will be to the conusor. R. 1 Rol. 425. l. 5. R. 1 Sid. 467.

If a condition be to make such reasonable assurance of land in fee, reserving rent to the feoffor in fee, as counsel shall advise, who devises a feoffment reserving rent in fee ; it is not good, for it will be a rent-seck, and the deed belongs to the feoffee. R. 1 Rol. 423. l. 35.

So though the agreement be to do it by deed, and he devises a feoffment by deed poll ; for it belongs to the feoffee. 1 Rol. 423. l. 30.

Otherwise, if the feoffment was by indenture. Semb. 1 Rol. 423. l. 45.

If a condition be to be bound with A. which imports a joint obligation, he need not execute an obligation joint and several. R. 1 Rol. 424. l. 40.

Though it be by such a writing and in such a sum as B. shall agree, and he agrees to an obligation joint and several. Semb. 1 Rol. 424. l. 45.

If a condition be to assure to B. as his counsel shall advise ; if B. himself devises, he is not bound to do it. R. 5 Co. 19 b. Cro. El. 297. R. cont. Cro. El. 465. 1 Rol. 466. l. 20.

Otherwise, if it be as counsel may advise. Semb. 1 Rol. 424. l. 5.

And if his counsel advises B. who gives notice of it to the obligor, it is well, and more proper than if counsel advises the obligor himself. R. 5 Co. 19. b. 1 Rol. 424. l. 15. Vide Cro. El. 298.

Otherwise perhaps, if it was, as counsel advises the defendant himself. Per Poph. Cro. El. 298.

If it be to make a release upon the performance of all the other part, who was to make a feoffment at the charge of B. he need not [*]make the release before the feoffment, though B. did not tender the charge. Dy. 371 a.

If a condition be to assure as counsel advises ; it is sufficient, that it be notified what sort of conveyance his counsel advises. Per Poph. Mo. 595.

But if it be as counsel devises, he ought to tender the conveyance engrossed. Ibid.

And if a condition be to make such assurance as the obligee or his counsel shall advise, he ought to give notice to the obligor what assurance is devised or advised. 5 Co. 23. b.

So if it be such release, &c. as A. his counsel shall advise ; he ought to procure A. to direct the release. R. 5 Co. 23. b. Cro. El. 716. D. cont. 1 Leo. 105.

If it be to make such assignment as counsel shall advise ; he ought to procure counsel to advise. Dub. 3 Mod. 192.

But if it be to make such release, &c. as a judge or a stranger shall advise ; the obligor ought to procure his advice. R. 5 Co. 23. b.

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Or, such as satisfies his counsel ; the obligor ought to tender a release to the counsel of the obligee, to know if he be satisfied with it. R. 2 Lev. 95.

So if it be to assure at the charge of the obligee, &c. he ought to notify what assurance he will make, before the other need tender the charges. R. Mo. 454. Ow. 157. 5 Co. 22. b. Cro. El. 517. 2 Mod. 75. Vide Election, (A 1, 2.) (*k*)

Or to make any particular conveyance, as a feoffment, &c. he ought to notify what feoffment, and how he will make it. R. 5 Co. 22. b. Cro. El. 517.

But if a condition be to assure such land to another, he ought to make the assurance at his peril.

So if it be to assure at the charge of the obligee ; he ought to assure without a tender of the charges, for the obligee does not know what charge shall be paid till the obligor gives notice what assurance he will make. R. 5 Co. 22. b. Mo. 454. Cro. El. 517. Ow. 157.

So if it be to make a feoffment or other particular assurance ; the obligor shall do the first act, and give notice what feoffment, &c. he will make. 5 Co. 22 b. Per Walmsley, but the other judges cont. Cro. El. 517.

Or to make the assurance which his own counsel shall devise ; he ought to procure his counsel to devise. Per Gawdy, 1 Rol. 464. l. 1.

If it be to assure land upon request ; he ought to make a good estate at his peril, without a tender of a conveyance by the obligee : for the request does not relate to the manner of conveyance but to the time. R. 1 Rol. 465. l. 5. R. Mo. 682.

So if a condition be to make, and upon request to seal an obligation. R. 1 Rol. 465. l. 25.

If a condition be to execute a release to the satisfaction of the counsel [*]of the plaintiff, he ought to do it without a tender. R. Ray. 232. 1 Vent. 255. 1 Mod. 104.

If a condition be, that two make an assurance as shall be devised, and the assurance be devised and tendered to one, who refuses ; the condition is broken, for he need not tender to both together. 1 Rol. 454. l. 45.

If a condition be, to make such assurance as the obligee shall devise ; he ought to execute it immediately when it is tendered, and shall not have time for advising with his counsel. R. 2 Co. 3. 1 Rol. 424. l. 25. 440. l. 5. 15. 441. l. 35. R. Dy. 338. a.

So if it be such assurance as the counsel of the obligee shall devise, and he tenders a surrender, &c.

So if he tenders a letter of attorney to make a surrender, he ought to take notice of the law, if it be an assurance within the condition, and shall not have time for advising. R. 1 Rol. 441. l. 45. Cro. Car. 299. Vide Jon. 314.

But if he advises a fine, he shall have a reasonable time to do it. R. 1 Rol. 441. l. 40. 466. l. 15.

If he be bound to make assurance at his own costs as shall be required ; the obligee cannot require more assurances than are necessary. Mo. 570.

If it be to surrender a copyhold upon request ; he shall have a reasonable time for it. Semb. Godb. 445.

(*k*) 1. Where an assurance is to be made at the charge of the obligee, he is bound to tender the charges before he can call upon the obligor to make the assurance. *Ld. R.* 750.—2. The obligee must notify what assurance he will make, where the particular assurance is not ascertained. *D. acc. Ld. R.* 750.—3. Where it is ascertained, he need not. *R. Ld. R.* 750.

If a request be to surrender by attorney ; he need not do it : for the covenantor has his election how he will surrender. Godb. 445. Jon. 314.

{ A bond with condition to convey a certain lot of land, containing 600 acres, is satisfied by the delivery of a deed describing the lot, and as "containing 600 acres more or less;" although, on actual survey, the lot was found to contain only 421 acres. Mann v. Pearson, 2 Johns. Rep. 37. }

(I) CONDITION TO INDEMNIFY.

A condition to indemnify against A. is broken by his threatening to beat the obligee, by reason of which he dares not go about his business. 1 Rol. 453. l. 12.

If a condition be to save harmless from an obligation in which he is bound to A., the obligor ought to discharge it by release, or otherwise. 1 Rol. 432. l. 25.

So if it be to save harmless from all suits and demands concerning that obligation. 5 Co. 24. a.

And therefore, if he pays the money at the day, though he was not sued or arrested for it ; the condition is broken. R. 5 Co. 24. a. R. 1 Rol. 433. l. 5.

So if the obligation be forfeited, whereby he is liable to be sued. Semb. 1 Rol. 432. l. 30.

A fortiori if he be sued, though the obligation be satisfied before execution. R. 1 Rol. 432. l. 45.

{ So if a bond be conditioned that the obligor should *within such time as he might choose*, discharge a debt for which the obligee was liable, and indemnify him from all costs, damage, &c. it was held, that the bond was forfeited on the obligee's being sued for the debt. Fish v. Dana, 10 Mass. Rep. 46. }

So if a condition be discharged of tithes ; it shall be broken if he be sued for tithes, though they be not recovered. 1 Rol. 430. l. 10.

If a condition be to save harmless from all actions which may arise upon the releasing of D. out of execution : he ought to indemnify him from an action upon his promise not to release. R. 1 Rol. 431. l. 45.

To save harmless from all legacies ; he ought to indemnify from a decree in a court of equity for a legacy. R. 1 Rol. 430. l. 5.

[*]But if a condition be to save harmless from all things contained in an indenture, he is not bound to indemnify from a collateral thing ; as, from an obligation in which he is bound to perform the covenants in the same indenture. 1 Rol. 432. l. 35.

Nor from actions in which he has a lawful defence without the obligor. 1 Rol. 432. l. 42.

So, a covenant to indemnify from all rents payable to the lessor, is not broken, if the rent be in arrear. 1 Rol. 433. l. 10.

Or if an illegal distress be taken for the rent. Ibid.

[If a covenant be to save harmless against a seizure made by A., it extends to it, whether the seizure be tortious or not ; but if a general covenant to save harmless, it extends not to tortious acts. Str. 400.]

So a condition to perform an award by which A. shall be acquitted of such a matter in a bill in chancery, depending against him, is not broken by the filing a new bill against him for the same matter, if no process issues against him. R. 1 Rol. 432. l. 20.

So a condition to save without damage from all prior incumbrances by
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him ; a prior assignment by him to B. is not a breach, if B. does not enter nor disturb the possession. R. 1 Rol. 430. l. 15.

So a bill in chancery, alleging that a lease was in trust for the lessor, is no breach ; for it does not meddle with the possession. R. 1 Rol. 430. l. 45.

So, though the words are large, they shall not be extended beyond the intent ; as if a condition be, to save harmless from the damages A. shall sustain on account of a bastard, he ought to indemnify from the charge of maintaining it, but not from a legal prosecution against A. for it. R. Lut. 669.

So, if a covenant be to save harmless upon request, if a damage happens before request, he is bound to indemnify : as, if a statute be extended before request. R. Mo. 139.

(K) CONDITION IN THE DISJUNCTIVE.

(K 1.) How performed.

If a condition be in the disjunctive, he who ought to do the first act shall have an election to do the one or the other. Co. L. 145. a.

As if a condition be to enfeof of such or such land, to pay gold or silver, to deliver one thing or another, the obligor has an election to do the one or the other. 1 Rol. 446. l. 20.

So if it be to enfeof, pay, &c. at the request of the obligee ; for his request only ascertains the time of the doing it. 1 Rol. 446. l. 25. 30. 467. l. 5.

So if it be to do at Michaelmas at his request, or at the feast of Easter. 1 Rol. 446. l. 40.

But where the disjunctive goes only to the time, and that is referred to the request of the obligee, it gives the election to him ; as, to do at Mich. or before, at the request of A. 1 R. 446. l. 35. 37.

If a condition be that before Mich. he make a lease for thirty-one years if A. assents, otherwise, for twenty-one years ; A. does not assent ; he ought to make a lease for twenty-one years before Mich. 1 Rol. 446. l. 15.

[*](K 2.) When it shall be excused.

If the condition be in the disjunctive, and the obligor has an election to do the one thing or the other, if one part becomes impossible by default of the party, he shall not be bound to perform the other part ; as, if it be to make such assurance to A. as A. shall devise, or upon default to pay 500l. If A. does not tender an assurance, he need not pay the 500l. R. 1 Rol. 446. l. 45. 2 Mod. 202, 203.

[But a condition to do one of two things, one of which becomes impossible, is no reason for not performing the other. 1 Bos. & Pull. Rep. 242.]

To deliver an obligation, or execute a release which A. shall tender, and he does not tender a release. R. 1 Rol. 447. l. 10.

So, if one part becomes impossible by the act of God. Vide ante, (D 1.)

But where the election is not affixed to the obligor till one part be requested by the obligee ; if it be not requested, the obligor ought to do the other part. 1 Rol. 447. l. 20.

So, if one part was impossible at the time of the making ; he ought to do the other part. 1 Rol. 450. l. 40. 45.

So, if a condition be to make a lease to A. for life before Mich. or to pay to him 100l. ; A. dies before Mich. and before the lease made ; he ought to pay 100l. to his executor. R. 1 Sal. 170.

Or, if a condition be that his son convey to B. and his heirs before

Mich. or shall pay 70l.; and B. dies before Mich.; he ought to pay the 70l. Semb. 3 Mod. 232.

So, if a condition be that a stranger appear, or pay so much; if he cannot appear, he ought to pay. R. Ray. 373.

(K 3.) What shall be a condition in the disjunctive.

If a condition be in the copulative, but it is impossible to be so performed, it shall be taken in the disjunctive; as, if it be that A. and his heirs or executors do such a thing. 1 Rol. 444. l. 20.

That A. and his assigns do it. 1 Rol. 444. l. 25.

(K 4.) Annuity *pro consilio*.

If an annuity be granted *pro consilio impendendo*, he ought to give his counsel on demand, for otherwise the annuity determines. 1 Rol. 435. l. 5.

Otherwise, if it was *pro consilio impenso & impendendo*. 1 Rol. 435. l. 10.

But the grantee need not travel, or do any thing but give his counsel, where he may be found. 1 Rol. 434. l. 30.

Otherwise, if a physician, who has an annuity *pro consilio & auxilio*. Semb. 1 Rol. 434. l. 40.

So, if it be granted *pro servitio & consilio*. 1 Rol. 434. l. 45.

And he need not travel with him, though the other is willing to pay his charges. 1 Rol. 434. l. 47.

So he need not set his hand to a bill in chancery. R. 1 Rol. 434. l. 50.

[*]So, if the grantor does not disclose his case, the grantee shall be excused. 1 Rol. 434. l. 33.

So, if the grantee gives such counsel as he is able; it is sufficient, though it be not good. 1 Rol. 434. l. 35.

(L) WHEN NON-PERFORMANCE SHALL BE EXCUSED.

(L 1.) If done as near to the condition as it can be.

If the condition be performed in substance, it is sufficient. Vide ante, (G 14.)

So, if it be performed as near the intent of the condition as can be; as, if a condition be, that the feoffee shall give the land to the feoffor and his wife, and the heirs of their bodies, &c. and before the estate is re-given, the feoffor dies; the condition will be performed, if the feoffee gives it to the wife for life without impeachment of waste, remainder to the heirs of the body of the husband upon the wife begotten. Lit. s. 352.

Or, that he shall give an estate to a layman in frankalmoigne (which cannot be); it is sufficient if he makes an estate to him for life. Co. L. 219. b.

Or, that he gives an estate in frankmarriage to A. with a daughter of the feoffor (which cannot be); it is sufficient if he make an estate to them for their lives. Ibid.

If a condition be to enfeoff two before such a day, and one dies, he ought to enfeoff the other. R. 1 Rol. 451. l. 2.

Or to enfeoff A. and his heirs, and A. dies; he ought to enfeoff the heir; for [and] shall be taken as a disjunctive [or]. R. 1 Rol. 450. l. 50.

So, if an obligation be to convey to A. and his heirs by scoffment or will, &c. and A. dies in the lifetime of the obligor, he ought to convey to his heir. R. Pal. 552.

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So as well when the condition is to defeat as to create an estate. Semb. cont. Co. L. 219. b. But the instances there acc. where no prejudice ensues to the parties.

As if a condition be, that if A. and B. pay such a sum at such a day, the feoffment shall be void, and A. dies before the day ; B. may pay it. Co. L. 219. b.

**(L 2.) If the feoffee accepts another thing in satisfaction.—
When it may be accepted.**

So, if a condition be to pay such a sum at such a day, and the feoffee or obligee accepts a horse, &c. or other collateral thing in satisfaction. Co. L. 212. b. R. 9 Co. 79. Peytoe. 1 Rol. 465. l. 5.

So, if a condition be, that a stranger pay to the feoffee ; and he accepts a collateral thing in satisfaction. Co. L. 212. b.

Or, if he accepts a less sum before the day, in satisfaction. Ibid.

Or, if he accepts a less sum at the day, and gives an acquittance for the whole in satisfaction, under his seal ; for the deed makes it to be in satisfaction of the whole. Ibid.

Or accounts with the obligor at the day, and discounts so much due from the obligee to him. 1 Rol. 471. l. 5.

[*]So, if the feoffee or obligee accepts a chose in action, in satisfaction ; as a statute for payment of money at a subsequent day. Co. L. 212. b.

Or another obligation for payment at a future day. Ibid. D. Cont. 2 Cro. 100. & Semb. that the law is cont. Vide post, (L 3.) Vide 1 Mod. 225. Hob. 68. Cro. Car. 86.

So, if he accepts a copyhold surrendered to his use in satisfaction. R. 1 Rol. 471. l. 25.

So, if a promise or contract, without deed, be to do a collateral thing ; money, or another thing may be accepted in satisfaction. 9 Co. 79. b.

(L 3.) When not.

But if a condition be to do a collateral thing ; the feoffee or obligee cannot accept money, or another thing in satisfaction ; for a contract in writing for a collateral thing shall not be altered by an accord without writing. Co. L. 212. b. R. 9 Co. 79. R. 1 Rol. 455. l. 50.

As, if a condition be to deliver an horse, &c. if the obligee accepts money or other thing in satisfaction, it is not sufficient. Co. L. 212. b.

Or to give a recognizance for 20*l.* and he accepts 20*l.* Ibid.

To perform covenants in an indenture. R. Dal. 106.

So, if a condition be to pay money to a stranger, it ought to be performed strictly, and it is not sufficient that the stranger accepts a collateral thing in satisfaction. Co. L. 212. b.

So, it is not sufficient, if the feoffee or obligee accepts a less sum in satisfaction, at the day, without a deed which acquits the whole. Co. L. 212. b. for a less sum cannot be a satisfaction for a greater.

And it ought to be a real and full satisfaction. Vide Accord, (A 1, 2.—B 1, &c.)

So, it is not sufficient, if the conusee of a statute or recognizance accepts an obligation in satisfaction ; for it is of less force. 1 Rol. 470. l. 37.

So, it is not sufficient if the obligee, after judgment upon an obligation, accepts another obligation for a greater sum in satisfaction. R. 2 Cro. 579.

Or, after the day of payment, accepts a statute or recognizance (which is

of a higher nature) in satisfaction. R. 1 Co. 44. b. 45. b. Cro. Car. 86. 1 Rol. 470. l. 50. Vide ante. (L. 2.)

Or after the day, accepts another obligation in satisfaction. 2 Cro. 579. Cro. Car. 86.

Or at the day, accepts another obligation for the same sum at a future day, in satisfaction. Vide ante, (L. 2.)

Or another obligation by the obligor and another. R. Hob. 68, 9. Cro. El. 727.. 1 Rol. 470. l. 30.

Or another obligation with a penalty, where the first was single. R. Cro. El. 716. 727.

So, if the obligee, before the day of payment, accepts another obligation for the same sum. D. 2 Cro. 100. R. if he accepts an obligation generally. Cro. El. 716. 727. Cro. Car. 86.

Or a bill sealed. R. Mo. 872.

So, if a condition be to pay money; an agreement to accept a collateral [*]thing in satisfaction is not sufficient, if it be not executed. 1 Rol. 456. l. 15 ad 30. Vide Accord, (B 1, &c.) 1 Rol. 470. l. 40.

(L 4.) By default of the party.—As upon tender and refusal.

So the non-performance of a condition may be excused by the default of the feoffee or obligee; as, if the feoffor or obligor makes a legal tender of the money to the feoffee or obligee, at the day and place appointed, and he refuses to accept it. Co. L. 207.

Who may make a tender, and to whom, vide ante, (G 1, 2.); and at what time and place, vide ante, (G 3, &c. G 9, &c.)

A tender may be in bags or purses, without shewing or reckoning the money. Co. L. 208. a.

And it is sufficient, if the whole sum be in the bag or more. R. 5 Co. 115. a.

So, if a condition be to enfeoff, &c. upon payment of so much money; a tender and refusal is tantamount. Dal. 106.

If pursuant to a condition upon a feoffment, &c. the money be duly tendered and refused; the feoffee loses the money for ever; for it is a sum in gross, collateral to the land, and he has not any remedy for it by law. Lit. s. 335. 338.

So, if a condition of an obligation be to do a collateral thing, as to deliver corn, timber, &c. tender and refusal is a perpetual bar. Co. L. 207. a.

So, if a statute, recognizance, or obligation be single, and afterwards there be a defeazance that it shall be void upon payment of a less sum; if such sum be tendered and refused, it shall be lost for ever; for it is collateral. Co. L. 207. a.

Otherwise, if an obligation be for payment of a less sum; this being a duty and part of the obligation, shall not be lost by tender and refusal, for if he pleads a tender he shall say *uncore prist.* Co. L. 207. a.

How a tender shall be pleaded, vide Pleader, (2 G 2.—2 W 28. 49.—3 K 23.—3 M 36.)

So, if a condition be to do any collateral act, if it be duly tendered and refused, the performance shall be excused. 1 Rol. 458. l. 15. 455. l. 20 ad 35. R. 3 Lev. 24.

(L 5.) By voluntary absence.

So the performance of a condition shall be excused by the absence of the feoffee or obligee, when his presence was necessary for the performance; [*120]

as, if a condition be, that he enfeoff the obligee, and he, having notice of the time is absent. 1 Rol. 457. l. 30. 32.

If a condition be to pay rent, and the lessee is ready, but nobody comes to receive it for the lessor. 1 Rol. 459. l. 35.

But if his presence is not necessary, his absence shall not excuse, though the act is to be done to him; as if a condition be to sing mattins at such a day, in his manor, for A. and his family; though they be absent, he ought to sing. 1 Rol. 457. l. 45.

To give a statute or obligation to the obligee; for it may be done in the absence of the obligee. 1 Rol. 457. l. 40.

[*]To grant an estate to one for life, remainder to B. though B. be absent, the condition shall not be excused. 1 Rol. 457. l. 45.

So, if a covenant be that an horse shall run, &c. giving notice to A. though A. absconds, by which notice can be given, yet the horse ought to run the race. R. 1 Sal. 214.

(L 6.) By the obstruction of the obligee.

So the performance of a condition shall be excused by the obstruction of the obligee; as if a condition be to build a house; and he, or another by his order, hinders his coming upon the land. 1 Rol. 543. l. 50.

Or says that it shall not be built. 1 Rol. 454. l. 2.

Or interrupts the performance. 1 Rol. 454. l. 5. 20.

} If the covenantee is the cause why the covenant is not performed, the covenantor is excused, and the money contracted to be paid him, becomes due as if he had actually performed the covenant. *Marshall v. Craig*, 1 Bibb, 379.

So he who prevents the performance of a condition cannot avail himself of the non-performance. *Majors v. Hickman*, 2 Bibb, 207. *Vide Carrell v. Collins*, 2 Bibb, 429. *Kennedy v. Kennedy*, 2 Bibb, 464. }

So, if a condition be that the lessee shall leave a house in good plight; and fire out of the chimney of the lessor next to it consumes it. R. 1 Rol. 454. l. 15.

If an annuity be granted, till a benefice be given to the grantee, and he is presented, but found unfit. R. 1 Rol. 435. l. 17.

So, if there be a recognizance to the king for appearance; and the party is imprisoned by A. and B. who act by lawful authority of the king. *Scmb. Mo.* 122.

But it ought to be an obstruction which disables the performance. *Vide post*, (M 5.—N.)

And performance shall not be excused by the negligence of the obligor. Nor by the act of a stranger. *Vide post*, (L 14.)

(L 7.) By default in doing the first act.

So, the non-performance of a condition shall be excused by the default of him who ought to do the first act; as if a condition be to resign a benefice for a pension, to be agreed between them; the obligee ought to agree the pension, and tender the deed of it. 1 Rol. 458. l. 10. Who ought to do the first act, *vide Election*, (A 2.)

To enfeoff such an one as the obligee or feoffee shall name; he ought to give notice whom he names. 1 Rol. 463. l. 2.

If a condition be, that a bailiff shall arrest a man, at the suit of B., he need not, till B. delivers to him a proper warrant; for this belongs to B.

and it would be maintenance in the obligor, and the law will understand the words as is proper. R. 1 Rol. 465. l. 40.

That a bell shall be carried to the house of the obligor, by the men of M., and there weighed, and put in the fire in their presence, and then the obligor shall make a bell in tone and sound agreeable to the others; it shall be weighed and put into the fire by the obligor, for it belongs to his occupation. 1 Rol. 465. l. 50. Pl. Com. 15. b.

(L 8.) In not giving notice.

So, if a condition be to do a thing upon the performance of an act by the feoffee or obligee, which is secret, and lies only in his breast, the performance of the condition is excused, till the feoffee or obligee gives notice that he has performed the first act; as if a condition, covenant, or promise be to pay as much for goods as every other pays; the obligee shall give notice how much another pays. 1 Rol. 463. l. 25. Hob. 51. R. 2 Cro. 432. 1 Rol. 468. l. 50. When notice is necessary, vide post, (L 9.)

[*]To account before such auditors as the obligee shall name; he ought to give notice what auditors he has assigned. R. 1 Rol. 462. l. 50.

To execute such deed or assurance as the obligee or his counsel shall devise. Vide ante, (H).

To pay so much to A. and B. at their full age; the condition is not broken till demand, or notice of full age. R. 2 Cro. 57.

So a title to land shall not be defeated by a secret condition or conveyance, to which he is a stranger, without notice of it given to him; as if a father covenants to stand seized, or devises to his eldest son, upon condition that he do such a thing; the heir shall not lose his estate by the non-performance of the condition, without notice of it. R. 8 Co. 92. a. Frances. R. 3 Mod. 34. Vide post, (L 9.)

So, if a condition be, to pay rent to the lessor or his assigns; the lessee shall not lose his estate by non-payment to the bargainee of the reversion, without notice of it. Per Wray, 3 Leo. 96. Per Poph. 5 Co. 113. Agreed, 8 Co. 92. Vide post, (O 1, 2.) Vide Copyhold, (M 4.)

If a condition be, that if his heir does not pay rent, it shall be to his executors, and if they do not pay, to his younger son; the estate shall not be forfeited by the non-payment of the executors, till notice that the heir did not pay. R. 2 Cro. 145.

When notice shall be given of the time of performing a condition. Vide ante, (G 9.)

How notice shall be given, vide Pleader, (C 73, &c.)

How request shall be made, vide post, (L 11.)

(L 9.) When not.

But generally, every one who has an interest in land, shall take notice at his peril of acts done concerning the same land; and therefore, the grantee or bargainee of the reversion shall distrain for rent, shall have waste, without notice to the lessee of the assignment. 5 Co. 113.

If a bailiff of a bishop collects rent of a lessee of his predecessor, not warranted by st. 1 El. 19. among other rents, and pays it to the bishop; this acceptance of the rent affirms the lease, without other notice. R. Cro. Car. 95. 1 Rol. 476. l. 15.

Especially, where no one is bound to give notice; as if a husband seized for life, remainder to his wife for life, remainder to his son in tail, makes a feoffment with warranty, which bars the son, and after his death the wife

joins with the son in a fine; the estate of the wife is forfeited, without notice of the feoffment. R. Cro. Car. 392. 1 Rol. 856. l. 25.

If a woman lessor marries, the lessee ought to take notice, and pay his rent to the husband; for if he afterwards pays to the wife, without his consent, he shall pay over again to the husband. R. 2 Cro. (617.)

So, every one ought to take notice of a condition, &c. contained in the same deed by which he claims; as if a devise be to A. upon condition that he do not marry without consent; the devisee shall take notice of the condition at his peril; for it is limited in the same conveyance by which he claims, and no one is bound to give notice. R. Mod. 87. 311. 1 Vent. 204. 2 Lev. 22. Vide infra.

[*]If a devise be for charitable uses, and if not performed, that it shall be to the mayor and commonalty of London, there needs no notice. R. Cro. Car. 577.

So, if a fine be to the use of A. in fee, but if B. pays 10s. before Mich. to him in fee; B. dies; his heir shall take notice at his peril of this condition. R. 1 Rol. 469. l. 25.

So, if a devise be to an heir, upon condition that he do not marry under 1000l.; he ought to take notice of the condition, for he takes his estate by the same will, and no one is bound to give notice. R. Cart. 172. And there it is said, that this differs from the case of Frances, 8 Co. 92. where the condition was, that he should not hinder the executor doing such an act, which is named by the will, and cannot be known, without notice of it. Cart. 172.

So, if a devise be upon condition, that he do not marry without consent, &c. R. Ray. 237. 2 Lev. 22. Vide supra.

Though the devisee be an infant. R. 1 Mod. 86. 1 Vent. 200. Vide *Enfant*.

So, if a condition, covenant, or promise be to do an act to a stranger, or upon performance of an act by a stranger, there needs notice; for it lies equally in the knowledge of the obligor and obligee, and the obligor takes upon himself to do it: as if a condition be to pay when A. marries, there needs no notice when A. marries. R. 1 Rol. 462. l. 10. 468. l. 13. Vide *Pleader*, (C 75.)

Or, when A. returns into the realm. R. 2 Cro. 492. 1 Rol. 463. l. 6.

Or, when A. rides to York five times in five days. 1 Rol. 463. l. 12.

So, to pay, if A. does not pay. R. 2 Cro. 684. R. 1 Rol. 462. l. 25. 463. l. 45.

To pay so much as A. shall name. R. 2 Bul. 144. R. Cro. Car. 133. 1 Rol. 464. l. 5.

To pay for all the acres above twenty so much as measured by A. R. 1 Rol. 462. l. 5.

To discharge from all escapes by A. R. Hob. 14.

To stand to the award of A. R. 1 Rol. 464. l. 40. 468. l. 7.

Or, to pay all arrears which shall be found upon account before A. 8 Co. 92. b. 1 Rol. 468. l. 5.

To pay the costs which shall appear due by his attorney's bill. R. 1 Rol. 467. l. 30. R. 4 Mod. 230.

To pay so much as shall be recovered by A. 1 Rol. 468. l. 10.

So, if a condition, covenant, or promise be to do, upon the performance of any certain and particular act by the obligee himself, he ought to do it, without notice by the obligee, that the act is performed; for he takes it upon him to do it at his peril: as if a condition be to pay so much when the ob-

ligece marries, there need not be notice of his marriage. R. 2 Cro. 102. 228. Yel. 168. R. 2 Cro. 405. 1 Rol. 468. l. 30. R. 2 Bul. 254. R. 3 Bul. 326. R. Poph. 164. R. Cro. Car. 34. Hut. 80. 1 Rol. 463. l. 20. Per. Ch. J. 1 Sid. 36.

Or, when the obligee delivers a horse to B. Per Yel. 1 Rol. 461. l. 45.

Or, comes to London, &c. Per Dod. 2 Bul. 145. R. 1 Rol. 462. [*]l. 15. Per Warb. cont. Hob. 68. R. cont. 1 Bul. 44. Dub. Ow. 108. Acc. Hut. 80. 1 Rol. 469. l. 5.

Or, becomes surety for his father. 1 Leo. 105. R. 2 Cro. 287.

So, to pay so much as the obligee borrows of B. Per three J. 1 Bul. 12. R. 1 Rol. 467. l. 50.

Or, for so many acres as shall appear when they are measured. R. 2 Cro. 472. 391. 1 Rol. 462. l. 45. 469. l. 10. 15.

Or, to pay so much as he shall sell at to B. R. 2 Cro. 432. 1 Rol. 463. l. 36.

To surrender to the obligee or his assigns upon demand; he ought to surrender to the assignee upon demand, without notice of the assignment. R. Poph. 136. 1 Rol. 465. l. 10.

To pay when he delivers wood to B. to his use. R. 1 Rol. 464. l. 30.

So, to pay so much as will content him for such a journey; there need not be notice how much will content him. R. 1 Leo. 123.

To repay 20*l.* if he dislike such land; there need not be notice that he dislikes it. R. Cro. El. 834. 1 Rol. 464. l. 20.

To deliver corn on shipboard at such a port; there need not be notice when the ship is ready. R. 1 Rol. 464. l. 25.

To pay upon the return of a ship from Hamburgh to D. 1 Rol. 469. l. 40.

So, if several are bound by obligation, covenant, &c. to do an act, upon notice to them; notice to one is sufficient. R. Mo. 555.

So, if an act ought to be done upon notice to B.; the absence of B., by which notice cannot be given, excuses notice. R. 1 Sal. 214.

When notice is not necessary of a bye-law, &c. Vide Pleader, (C 75.)

(L 10.) In not requesting.

If a condition be, that the lessee repair, and that the lessor find timber; the lessee ought to demand timber, and give notice how much will be sufficient. R. 1 Rol. 465. l. 20.

That he inrol a deed in guildhall; the other ought to request. 1 Rol. 458. l. 50.

That he procure his apprentice his freedom, if it be requested; an express request is necessary. R. Sal. 585.

(L 11.) How a request shall be made.

If a condition be to do upon request, the request ought to be certain and express: and therefore, if a lessor ought to find timber to the lessee for repairs, it is not sufficient that the lessee demand timber generally, but he ought to notify how much is necessary. R. 1 Rol. 465. l. 20. Vide Pleader, (C. 69, &c.)

If a condition be to surrender a copyhold upon request; it is not sufficient that he require him to seal a letter of attorney to make the surrender, but he ought expressly to require a surrender. R. 1 Rol. 467. l. 5. Jon. 314.

So, the request ought to be to the person himself, who ought to do it.

[*] And therefore, it is not sufficient to say, that he should not find him,
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and made proclamation in the church, and at several markets, to notify his request. R. 1 Rol. 443. l. 45.

But where a condition is to deliver possession to the lessor or his assigns, who assigns to two, a request by one is sufficient. R. 1 Rol. 428. l. 10.

So, if a condition be to make him free of a company at the end of seven years, if he be requested; he ought to make request the last day of the seven years at a convenient time before night, that the thing may be done. R. Sal. 585.

And a request at any place is sufficient, though the thing is to be performed at a certain place. Vide ante, (G 9.)

So, if a condition be to do upon request, and he is disabled to perform, there needs no request, for it would be in vain. R. 5 Co. 21. a. Semb. Lut. 308. Vide post, (M 2, 3.)

(L 12.) Non-performance shall be excused by the act of God.

So, the non-performance of a condition shall be excused by impossibility, or the act of God, if there be no default in the party. Vide ante, (D 1, 2.)

So, in a promise, as well as in an obligation or condition, if the party be disabled by the act of God before a breach, he shall be excused: as if a man lends a horse to B. for his use, who promises to redeliver it upon request, and the horse dies before request. R. Pal. 550.

(L 13.) Non-performance shall be excused by act of law.

So, the performance of a condition shall be excused by an act of law, which is necessary and inevitable; as if a condition be, that the feoffee pay so much out of the profits annually to charitable uses: if he dies, and his heir be in ward to the king, the payment shall be excused; for it ought to be out of the profits, which are transferred by act of law to the king. R. 1 Rol. 451. l. 30.

But if a condition be, that he shall be his attorney in all pleas, and he is made sheriff; this does not excuse him. 1 Rol. 451. l. 25.

If it be, that he pay rent to A. as long as he enjoys the land, and he surrenders to the obligee. R. Mo. 597.

{ So the non-performance of a contract will be excused where by a subsequent law, the performance becomes unnecessary. *Peart's Heirs v. Taylor's Devisees*, 2 Bibb, 561. }

(L 14.) But not by the act of a stranger.

If a condition be to do a thing, and a stranger interrupts him; that does not excuse the performance; as if he disseises him. Vide post, (M 5.)

Or, recovers goods to be delivered. 1 Rol. 452. l. 5.

Or, imprisons a person who ought to appear. 1 Rol. 452. l. 10.

So, if a condition be to do a thing to a stranger, who refuses to accept it; this does not excuse, for he took upon himself to do it. 1 Rol. 452. l. 30.

Or, to do by direction, &c. of a stranger. Lit. 13. *

So, if a condition be to surrender to a stranger; a surrender to another [*]person, by his request, is no performance, for he cannot vary the condition. R. 1 Rol. 457. l. 15.

Or, after recovery, to enfeoff a stranger; and he accepts it before the recovery. Semb. 1 Rol. 453. l. 20.

(M) WHAT SHALL BE A BREACH.

(M 1.) An act contrary to the intent.

But it shall be a breach of a condition, if the feoffor or obligor acts contrary to the very intent of the condition ; as, if a condition be for quiet enjoyment, and the lessor enters upon him wrongfully. 1 Rol. 429. l. 30. 45. 430. l. 20. Vide ante, (G. 12.) Vide ante, (E—G 12, &c.) Vide Chancery, (2 Q 2, &c.)

If a condition be, that he do not let a shop-yard, or other thing appertaining to a house, to such a one as sells coals ; and he lets the whole house. 1 Rol. 427. l. 35.

That he do not interrupt in an office ; if a new officer be made, who ousts him, yet if the obligor also interrupts, it is a breach. R. 1 Rol. 453. l. 5.

That he do not make debate about an administration ; and he causes him to be cited upon it. 1 Rol. 434. l. 2.

That he do no waste ; and he permits waste. 1 Rol. 428. l. 20. Cont. per three J. 1 Rol. 428. l. 30.

That he do not assign ; and he assigns in equity. R. Ray. 460.

If a condition be, that he enjoy without the interruption of any ; a prosecution in a court of equity is a breach. R. Ray. 371. Per Dy. cont. 3 Leo. 71.

That he permits him to reap corn : a prohibition by parol is a breach. Ray. 371.

If a condition be, that the heir do not disturb by suit or otherwise, if he enters upon him it will be a breach. 2 Mod. 7.

So, if a condition be, that he instruct him as his apprentice in chirurgery, and maintain and employ him *in domo et in servitio*, for so many years : if he sends him to the Indies with expert chirurgeons for his better instruction, it will be a breach. R. 1 Rol. 427. l. 50. Hob. 134.

Otherwise, if he sends him several journies, within the kingdom, where he returns after the cure performed. 1 Rol. 445. l. 12. Hob. 134.

Or, if he sends him out of the kingdom, when the nature of the service requires it ; as if he was apprentice to a merchant or sailor. 1 Rol. 428. l. 5. 445. l. 15. Hob. 135.

If a condition be, that he do not devise a term for years to A. and he devises it, but his executor does not assent ; yet it shall be a breach, for he did all that was in him to devise it. Per three J. 1 Rol. 428. l. 45. 2 Cro. 75.

So, if he devises it to his executor for payment of debts ; though his executor would have it without a devise. 1 Rol. 428. l. 52.

So, if a condition be, that he doth not alien a term ; and he devises it to his executor. R. 1 Rol. 429. l. 5.

That he do not grant a reversion without licence : and he grants, but the lessee does not attorn. Per three J. 1 Rol. 429. l. 10.

[*]That he do not assign so that it comes to A., and he assigns to B. ; for he puts it in the power of B. to assign to A. R. 1 Rol. 429. l. 15.

That the lessee or his assigns do not alien ; and the executrix of the lessee takes husband, who aliens. Semb. Dy. 6. b.

(M 2.) By a disability to perform.

So a condition shall be broken, if the party has disabled himself to perform it : as if a condition be to enfeof the feoffor, and he enfeoffs a stranger. Lit. s. 355. 1 Rol. 447. l. 40.

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Or, makes an estate in tail, or for life, to a stranger. Lit. s. 355.

Or, enters into religion. Co. L. 221. b.

Or, suffers a recovery against him by default. Co. L. 222. b. if execution be sued upon it. 1 Rol. 447. l. 45.

Or, a real discovery be against him, and execution thereupon. 1 Rol. 448. l. 25.

(M 3.) Or to perform in the same plight.

So, if he be disabled to perform in the same plight and condition that it was when the condition was created. Co. L. 221. a.

As, if a condition be to enfeoff, and he leases for years to another. Lit. s. 356. R. 1 Co. 25. b.

Though the lease be to commence *in futuro*. Co. L. 221. a. R. 2 Co. 59.

Though it be only a possibility of a charge *in futuro*. Co. L. 221. b.

So, if he takes a wife: for she will be thereby entitled to dower, if she survives. Lit. s. 357.

So, if a woman takes husband. Semb. Hard. 463.

So, if he grants a rent-charge out of the land. Co. L. 221. b. 222. 1 Rol. 447. l. 50.

Or, acknowledges a statute or recognizance. Co. L. 222. a.

Or, a judgment be against him. Ibid.

So, if a condition be, that he re-enfeoff during his life, and he dies; the condition is broken. Co. L. 222. b.

That he re-grant an advowson, and before he does it the church becomes void; the condition is broken. Co. L. 222. b. Vide ante, (G 5.)

If a condition be, that he deliver an obligation, and he sues and recovers upon it, and then delivers it; it shall be a breach of the condition, for it ought to be delivered in the same plight as it was at the time of the condition created. R. 1 Rol. 447. l. 30.

Or, that he cancel a statute, recognizance, &c. and he extends it, and then cancels it. R. Ray. 25. 1 Sid. 48.

And if, before the condition broken, the other ought to do the first act, he need not do it, when the party has disabled himself to perform the condition; as if the obligor ought to make a new lease upon a surrender of the old; if he levies a fine by which he cannot make a new lease, the condition is broken, though the other does not surrender. R. 5 Co. 21. Cro. El. 450. 479. Vide ante, (L 11.)

[*](M 4.) Though the disability be afterwards removed.

And if a feoffee, &c. be at any time disabled by himself to perform: the condition shall be broken, though the disability be afterwards removed, and the feoffor may re-enter after the removal; as if after a feoffment to a stranger the feoffee takes back an estate to him and his heirs, the feoffor may enter for the condition broken. Co. L. 221. b. 1 Rol. 448. B.

So, if the feoffee enters into religion, and is deraigned before the day limited for performance of the condition. Co. L. 221. b.

Or, the wife dies. Ibid.

Or, a rent-charge determines. Co. L. 222. a.

Or, the grantee chooses to have a writ of annuity: by reason of which the land was never charged. Ibid.

But if the disability on the part of a feoffor be removed before the time of performance, the condition may afterwards be well performed; as if a

condition be to pay so much to the feoffor or his heirs, before such a day ; if the feoffor be attainted for treason or felony, but before the day the heir is restored, it ought to be paid. Co. L. 221. b.

(M 5.) What shall not be a disability.

But if a condition be to enfeoff, and the feoffee be disseised ; this is no disability, nor breach of the condition, for he may enter upon the disseisor, and make the feoffment. 1 Rol. 453. l. 40.

So, if he be disseised by the feoffor or obligee himself. Ibid.

So, if during the disseisin the feoffee takes a wife, acknowledges a statute, or recognizance, &c. which dies, or is discharged, and then he re-enters ; the condition is not broken, for there never was any possibility of charge upon the land. Co. L. 222. a. R. 2 Co. 60.

So, if joint-tenants are bound, with condition to convey, &c. and one takes a wife ; for she has no title of dower, if her husband does not survive. Hard. 463.

So, if a condition be, not to permit a whore in his house after warning ; and he warns such a woman, but afterwards commands her to stay, this command does not disable the removal, and therefore does not excuse the breach. 1 Rol. 454. l. 25, 8 Co. 91. b.

If the feoffee be disseised by the obligee or feoffor himself, and he does not enter and make the feoffment within the time limited : it will be a breach.

So, if a condition be, that the lessee shall drain off water before such a day, and the lessor enters, and continues in possession till the day ; it will be a breach. R. 1 Rol. 453. l. 45.

(N) WHAT SHALL NOT BE A BREACH.

But if a condition be, that he permit the executor to take goods : a verbal denial is no breach, but there ought to be some act, as resistance, shutting up the house, &c. R. 8 Co. 91. 1 Rol. 430. l. 50.

If it be, that he do not molest, vex, &c. any copyholder paying his [*]services ; an entry upon him to beat him is no breach, if he do not oust him of his copyhold. R. Cro. L. 421. Mo. 402.

Vide ante, (M 1, 5.)

(O) WHO SHALL TAKE ADVANTAGE OF A CONDITION
BROKEN.

(O 1.) By the common law.

If a condition in deed be broken, none shall take advantage of it by re-entry, but the feoffor or his heirs ; for a re-entry cannot be reserved or given but to the feoffor, donor, lessor, or his heirs. Lit. s. 347.

[A right of entry always supposes an estate ; and if an estate is granted to a man, reserving rent, and in default of payment, right of entry is granted to a stranger, it is void. 3 Atkins, 134, Etiam supra.]

And it may be reserved to the heir, where the feoffor himself cannot take advantage of it. Co. L. 214. b.

And a guardian in chivalry, or socage, may enter in right of the heir. Co. L. 215. b.

So, if a condition to an estate by a corporation be broken, the successor may take advantage of it. Co. L. 214. b. R. Mo. 52.

So, the king may enter in right of an infant in his wardship. 1 Rol. 473. l. 47. 50.

So, if it be annexed to a term for years, the executor or administrator may. Co. L. 214. b.

So, an heir, successor, &c. may take advantage of a condition in deed broken in the time of his ancestor, predecessor, or in vacation. R. Mo. 52.

But, by the common law, the assignee or grantee of a reversion could not enter for a condition broken: for to prevent all maintenance, &c. the common law did not allow the assignment of a chose in action, or of a title to entry, or re-entry. Co. L. 214.

So, for a condition broken upon a lease by *cestuy que use*, the feoffees could not enter, though they are privy in estate. Co. L. 215. a.

Nor the lord by escheat. Lit. s. 348.

Nor any assignee in deed, or in law. Co. L. 215. b.

Nor a person in remainder. 1 Rol. 473. l. 44.

Yet, by the common law, if a condition in law annexed to have estate is broken; the assignee of the reversion shall have advantage of it; as, if lessee for life commits a forfeiture. Co. L. 215. a.

So, the lord by escheat, and every one who has the land, for a breach in his time. Ibid.

So, if by a condition broken, the estate ceases without entry, the assignee shall have advantage of it: as, if a lease for years be, upon condition, that if such a thing be done, it shall be void; for by breach of the condition it is absolutely determined. Co. L. 214. b. 1 Rol. 473. l. 55.

Otherwise, if a lease for life, &c. be, upon condition, to be void for non-performance; for, notwithstanding those words, an estate of freehold will not cease without entry. Co. L. 214. b.

Or, if a lease for years be upon condition, that if such a thing be done, the lessor shall re-enter: the grantee of the reversion shall not have advantage of it, for he cannot enter. Co. L. 215. a.

If a limitation be annexed to an estate, the grantee of the reversion shall take advantage of it: for the estate determines *ipso facto* without entry. Co. L. 214. b.

[*]So, none can enter for a condition broken, as bailiff to another, without his command. R. Mo. 52.

[An entry by a stranger without authority is good, if it be assented to afterwards, and will support ejectment, if the assent be before the demise in the declaration. 2 Str. 1128. Vide supra.]

(O 2.) By the stat. 32 H. 8. 34.

And now by the st. 32 H. 8. 34. a grantee from the king of any reversion, &c. and all other grantees or assignees, &c. their heirs, executors, administrators, and assigns, shall have like advantage against lessee, &c. by entry, &c. as the lessors or grantors themselves.

And therefore, every grantee of a reversion by the king, or a common person, shall take advantage, by this statute, of a condition broken. Co. L. 215. a.

So, an assignee of the king's successor, though the king only be named. Ibid.

So, a grantee of the reversion by bargain and sale inrolled, though he is not in from the bargainor in the *per*, but in the *post* by the stat. of uses, yet he is an assignee within the stat. for he claims by the bargainor. Co. L. 215. a. 3 Co. 62. b. R. Mo. 98. 4 Leo. 29.

So, if a reversion be granted to the use of another. Co. L. 215. b.

So, a grantee of a reversion only for life or years, shall take advantage of a condition. Co. L. 215. a.

So, if a devise be for years, rendering rent, upon condition, and by the same will the inheritance is devised to A. and his heirs: A. shall have the reversion, and shall take advantage of the condition, though it was not a reversion in the devisor. R. 2 Leo. 33.

So, if a bargainee of a reversion, before attornment, conveys to B. to whom the lessee attorns; B. shall take advantage of a condition, though his grantor could not for want of attornment. R. 5 Co. 112. b. Cro. El. 833.

So, an assignee of an assignee *in perpetuum*. 4 Leo. 29.

But an assignee of a reversion by bargain and sale, by grant, feoffment, or fine, shall not take advantage of a condition broken, before notice of the assignment. Co. L. 215. a. b. Vide ante, (L 8.)

And by the st. 32 H. 8. 34. an assignee of a reversion shall not take advantage of a condition annexed to an estate-tail: for the statute speaks only of lessees. Co. L. 215. a.

So, a lord by escheat, who claims only by act of law, shall not be an assignee within this stat. to take advantage of a condition broken. Co. L. 215. b.

Nor a lord of a villein: nor he who enters for mortmain. Ibid.

So, an assignee of part of a reversion shall not take advantage of a condition: as, if a lease be of three acres upon condition; the assignee of the reversion of two acres shall not enter if the condition be broken; for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed. Co. L. 215. a. R. Dy. 309. 5 Co. 55. b. 1 Rol. 472. l. 35. R. Mo. 98. R. Cro. El. 833. 4 Leo. 27. Vide post, (Q).

Otherwise in the case of the king: for the king shall have advantage of the breach. Co. L. 215. a. Dub. Mo. 204. R. 5 Co. 56. a.

So, a condition may be apportioned by act of law: as, if a man makes a lease of two acres, one of the nature of borough-english, the [*]other at common law, upon condition, and dies, having two sons; each may enter on a breach, into his acre. Co. L. 215. a. Dy. 309.

So, it may be apportioned, by the wrong and act of the lessee. Co. L. 215. a.

So an assignee of a reversion shall not take advantage of a breach of every condition, but only of a condition for payment of rent, for not doing waste, or other matter of like nature; for though the stat. speaks of (other forfeiture), it shall be understood only of other forfeiture of the same nature. Co. L. 215. b.

As, of a condition to do a thing incident to reversion, as payment of rent is. Ibid.

Or, to deduct out of a rent-charge if he be disturbed. 4 Mod. 82.

Or, for the benefit of the estate, as is the not doing waste. Co. L. 215. b.

So, is a condition for repairing houses, fences, &c. Ibid.

For preserving the wood. Ibid.

But an assignee shall not take advantage of a condition for payment of a sum in gross. Ibid.

Or, for delivery of corn, wood, &c. Ibid.

Or, of a condition, that the lessee shall not assign without licence. Semb. Ray. 250.

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(O 3.) How he shall enter for a condition broken.—Where an entry is given till satisfied.

A condition to a feoffment, &c. may give an entry generally, or a special entry ; as, till he be satisfied, &c. (1)

If a condition be, that he shall enter and hold the land till he be satisfied ; he shall have the land only in nature of a distress. Lit. s. 327.

If a condition be, that he shall have the land till he be thereof satisfied, or words which are tantamount ; the profits of the land shall be in part of satisfaction. Co. L. 203. a.

But where a condition is, that he shall have the land till he be satisfied the rent to be paid, without saying thereof, or to the same effect : the profits do not go in satisfaction, but shall be taken to his own use, as a penalty to enforce the payment. Ibid.

If the profits are in part of the satisfaction : when the rent is satisfied by perception of the profits, the feoffee may re-enter. Co. L. 203.

Or, if the rent be satisfied in part by perception of profits, and in [*]part by payment, or by tender and refusal, which amount to payment. Co. L. 203. a.

If the profits go in satisfaction, during his perception of them, he shall not have debt for the rent in arrear. Ibid.

So, if they do not go in satisfaction, where the estate, to which the condition was annexed, was for life, &c. ; for the freehold continues in lessee for life, and then debt does not lie for the rent. Ibid.

If he, who enters till satisfied by the profits, be interrupted in the perception of the profits by the act of God, as by wildfire, an inundation of the sea, &c. which happens without his default ; he shall (beyond the time in which he might have been satisfied if there had been no interruption) hold till he be satisfied. R. 4 Co. 82. b.

So, if he be interrupted by the feoffee himself, he may hold over, or take his remedy by action against him : for he shall not have advantage of his own wrong. R. 4 Co. 82.

But where he is prevented by his own negligence or default, as by the entry of a stranger, by enemies of the king, by ignorance of the condition, &c. he shall not take the profits beyond the time in which he might be satisfied. R. 4 Co. 82. Sir And. Corbet.

If rent be granted with a condition, that if it be in arrear, the grantee, his heirs and assigns, may enter and hold the land till satisfied by the profits : the assignee may enter and hold till satisfaction. R. 1 Sand. 112.

And the grant is good, though the deed be not inrolled ; for this uncer-

(1) 1. A proviso in a lease, to enter for a condition broken, can only operate during the term. 3 Wils. 127.—2. It is a rule, in the construction of contracts, to adhere literally to the expressions which the parties have used, unless there can be seen a decisive reason for departing from them, rather than to proceed on an intention not expressed, and to be formed only from conjecture. The court must be perfectly satisfied of the intention of the parties, before they will swerve from this rule, since where there is room for opposite conjectures as to the intent, it is impossible to decide. Hence, where a proviso was inserted in a lease, "that if all or any of the covenants hereinafter contained on the part of the lessee shall be broken, it shall be lawful for the lessor to re-enter ;" and as it happened, there were covenants on the lessee's part *before*, but none *after* the proviso ; held, that the word "hereinafter" could not be rejected. As the proviso stood, it was nugatory ; from which the inference was, that the parties meant "hereinbefore" instead of "hereinafter." Opposed to this was the conjecture, that they might have originally intended to have introduced further covenants by the lessee. 4 M. & S. 265.

tain interest may attend a certain and fixed estate. R. 1 Sand. 112. 1 Sid. 344.

So if the grant be by deed with a covenant to levy a fine, which is levied of the land accordingly; the assignee of the rent shall take advantage of the condition, which shall be transferred with the rent, though it was only a possibility. R. 2 Rol. 48. l. 45.

But if a man purchases the manor of D. and has other land conveyed as a collateral security, to the use of the vendor and his heirs till the purchaser be evicted by his wife, and then to the use of the purchaser, his heirs and assigns, till satisfied the damage had by such eviction; if he assigns the manor of D., the assignee, being evicted, cannot enter into the other land: for the use being contingent, was not assignable before it happened. R. 2 Rol. 49. l. 5. (m)

(O 4.) What interest he has.

He who enters, has only the pertainancy of the profits till satisfied, and no certain interest; for the freehold continues in the feoffee, &c. Co. L. 203. a.

Though the condition be, that the feoffor, his heirs and assigns, enter, &c. R. 1 Sand. 112. 1 Sid. 344. Ray. 136. 158.

[*] And if he enters, his interest goes to his executors. R. 1 Sid. 223. 262. 344, 5. D. Al. 45.

But he who enters, may maintain an ejectment; for he has an interest to make a lease for trial of the title. R. 1 Sid. 345. 1 Saund. 112.

(O 5.) Where this entry is general.

If a condition upon a feoffment or other estate of freehold, be, that for non-performance the feoffor, &c. shall enter; if the condition be broken, the estate is not defeated, generally, till entry or claim: and therefore, if he can, he ought to make an actual entry. Co. L. 218. a.

And if the estate lies in grant, as an advowson, rent, reversion, &c. he ought to make a lawful claim. Co. L. 218. a.

So though the condition be, that for non-performance the estate shall be absolutely void; for an estate of freehold cannot regularly cease, without entry or claim. Co. L. 218. a. 2 Co. 50. 2 And. 8.

So though the condition be upon a bargain and sale, which passes only an use, which might cease at the common law without a claim; for now, by st. 27 H. 8. the possession is executed. R. 2 Co. 53. b.

Yet in case of necessity, there need not be an entry or claim: and therefore, if a lease be for five years, upon condition, that if the lessee within two years pays 20l. he shall have the fee, and livery is made, by which the lessee has a fee conditional: if he does not pay, the fee shall be revested without entry, for he cannot enter during the term. Lit. s. 350.

So if a rent be granted out of his land, upon condition; if the condition

(m) 1. An underlease is not an assignment to the effect of working a forfeiture under a proviso not to assign. Dougl. 57. 184.—2. If a lease contain a proviso, making it void, if the lessee alien without licence, an assignment by operation of law, such as by the sheriff, under a *bona fide* execution, will not amount to a forfeiture; *secus*, where the execution is in fraud of the covenant, as where the lessee gives a warrant of attorney to confess judgment to a creditor, for the express purpose of enabling such creditor to take the lease in execution under the judgment. 8 T. R. 57. 300.—3. If a tenant gives his creditor the power of divesting his estate, a subsequent disposition, though at the time under legal process, must be considered as with his consent, so as to avoid his estate, held upon the condition that he does not voluntarily dispose of it. 2 East, 481.

be broken the rent shall be extinct, without claim, for he need not claim upon the land which he has in his own possession. Co. L. 218. a.

So if a feoffment be upon condition, and before the time of performance, the feoffee leases for years to the feoffor, and then the condition is broken, the feoffor, being in possession, cannot enter. Ibid.

So if a covenant be to stand seized to the use of himself for life, remainder over with power of revocation: if he revokes, there needs no entry or claim. Co. L. 218. b. R. 1 Co. 174.

By whom entry may be made, vide Claim, (B 2.)

(O 6.) He shall be in his first estate.

He who enters for a condition broken, regularly shall have the land in his first estate. Co. L. 202. a. 1 Rol. 474. l. 17.

And therefore, if tenant for life makes a feoffment, and enters for the condition broken, he shall be seized for life, the reversion as before. 1 Rol. 474. l. 27.

So if he enfeoffs him in reversion, upon condition. 1 Rol. 174. l. 30.

So if a man grants, or devises for life, upon condition, remainder over, if it be a good condition, the entry for the condition broken will destroy the remainder. 1 Rol. 474. l. 40. 45. Cont. Dy. 127. Acc. 29 Ass. 17. R. acc. 10 Co. 41. b. 1 Rol. 472. l. 40. 45.

And therefore, a condition annexed to an estate for life, where a remainder over is limited, shall be taken as a limitation. Vide post, (T).

But otherwise will it be in case of necessity: as, if a man seized in right of his wife, makes a feoffment upon condition, and his heir enters for the condition broken, his estate immediately ceases, and shall be vested in the wife. Co. L. 202. a.

[*]If *cestuy que use* made a feoffment before st. 27 H. 8. upon condition; and entered for a breach after the stat. he would be seized of the estate, whereas before he had only the use. Co. L. 202. a.

If tenant in special tail enfeoffs upon condition, and his wife dies, and then he enters for a breach; he shall be only tenant in tail after possibility. Co. L. 202. b.

So he shall not have it in his first estate as to collateral qualities: as, if tenant by homage ancestrel makes a feoffment upon condition, and enters for a breach, he shall not hold afterwards by homage ancestrel, for the prescription was interrupted. Ibid.

So if a copyhold escheats, and the lord makes a feoffment of it upon condition, and enters for the breach. Ibid.

If tenant for life makes a feoffment, and enters for the condition broken, it shall be subject to a forfeiture. Ibid.

So if a grantee of a ward by the king grants to the ward himself for 1200*l.* to be paid at his full age, his wardship and marriage for ever, upon condition, that if he dies within age or before the 1200*l.* paid, the grant shall be void; if he dies within age, the wardship and marriage are not revested. R. Sav. 79, 80.

Entry for a condition broken defeats the estate, to which the condition was annexed, to all intents: and therefore, if the feoffee upon condition dies, and then the feoffor enters for the condition broken, the wife of the feoffee shall not be endowed. 1 Rol. 474. l. 10.

(P) WHAT SHALL BE A DISPENSATION.

If after a condition broken annexed to an estate of freehold, and notice of it, the feoffor, accept the rent due at a subsequent day ; it shall be a dispensation of the forfeiture, for he allows the estate to have continuance. Co. L. 211. b. Per three J. Cro. El. 553. 572. Vide Copyhold, (M 8.) Vide Forfeiture, (A 11, 12.)

{ So where there is a forfeiture of an estate of freehold, upon condition for non-payment of an annuity, and the grantor subsequently accepts the sum due, it is a waiver of the forfeiture. Chalker v. Chalker, 1 Conn. Rep. 79.

And where a bond is given for the payment of money on a day certain, or within a certain time, payment after the expiration of the time specified, will save the condition of the bond. Gage v. Gannett, 11 Mass. Rep. 217. Vide Bond v. Cutler, 10 Mass. Rep. 419.

But if a bond be conditioned for deed of land, to be delivered in a reasonable time after payment of the purchase money, 90 days after payment, is not a reasonable time, though the tender of the deed be made before action brought on the bond. Aiken v. Sandford, 5 Mass. Rep. 494.

What acts or omissions of the obligor shall work a forfeiture of the condition of a bond. Eaton v. Stone, 7 Mass. Rep. 312. Dawes v. Bell, 4 Mass. Rep. 106. }

So if a condition upon a lease for years be, for non-payment of rent to re-enter, the acceptance of rent at a subsequent day is a dispensation. Cro. El. 553. 572.

So if he restrains, or brings an assize for rent due at the same day, or a subsequent day. Co. L. 211. b. 1 Rol. 475. l. 25.

Or for rent incurred at a day precedent: for he affirms the estate to have continuance. 1 Rol. 475. l. 30.

So if a condition be that he shall not assign, acceptance of rent from the assignee will be a dispensation. R. 2 Cro. 398.

If it be alleged, that he knew it, it is sufficient; for he had not notice, it shall come of the other part. R. 2 Cro. 398.

But if a condition be to do a collateral thing; acceptance of rent before notice of forfeiture, is not a dispensation. R. 3 Co. 65. Cro. El. 528.

So if a condition be to pay money; acceptance of rent due before, is not a dispensation.

So if he afterwards accepts the rent, by the non-payment of which the condition was broken, and gives an acquittance for it. Co. L. 211. b.

So if by a condition broken the estate absolutely ceases; acceptance of rent, due at the same or a subsequent day, does not affirm it: as, if a lease for years be upon condition for non-payment to be void. R. 1 Rol. 475. l. 35.

[*] Though a lease be by the king, and he afterwards accepts the rent in the exchequer upon record. R. 1 Rol. 475. l. 40. Cro. El. 221. 2 Leo. 134. 1 And. 303. Adm. Mo. 294. Poph. 25. 53.

So if a condition be, that he do not assign without licence, and after notice of such assignment, the lessor accepts the rent from the assignee. R. 1 Rol. 476. l. 5. Cro. Car. 512.

If a licence be to alien; the death of him who gave it, before alienation, is not a countermand. Co. L. 52. b.

{ It seems, that the time of performing a condition may be enlarged by parol. Fleeming v. Gilbert, 3 Johns. Rep. 528.

So the performance of a condition may be waived by parol. Ibid. }

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(Q) WHAT ACT DESTROYS A CONDITION.

If after a lease upon condition, the lessor grants the reversion of part of the land, this destroys the condition. *Vide ante*, (O 2.)

So if the lessor releases the condition.

So if a feoffee upon condition makes a lease for life, remainder to B., and the feoffor releases the condition to the lessee only; the whole condition is gone. *Co. L. 297. b.*

So if a condition be to do such an act, and the lessor discharges him of part; the whole condition is destroyed: as, if a condition be to plough his land, or build his house, and he discharges him of part. *1 Rol. 471. l. 47. 52.*

So if a condition be to go with B. and C. and he discharges him as to B. *1 Rol. 47. l. 50.*

If a condition be, that he do not demise any part without licence, if he licences as to any part, he may demise all the residue, without licence. *1 Rol. 471. l. 42. 2 Cro. 102. R. 4 Co. 120. Cro. El. 816.*

Or that he and his assigns do not demise; if he assigns by licence, the assignee may afterwards demise, without licence. *R. 1 Rol. 471. l. 35. 4 Co. 120. a. Cro. El. 816.*

Or that none of the lessees demise without licence, and he gives licence to one; the other lessees may demise without licence. *1 Rol. 472. l. 7. 4 Co. 120.*

So if a lessor gives licence, the lessee may use it after a grant of the reversion. *R. 2 Cro. 102.*

Or the death of the lessor. *Co. L. 52. b.*

So if a condition be, that he shall assign only to his wife or brother; if he assigns to the brother, he may afterwards assign to another. *R. 2 Cro. 38. Per two J. three cont. Dy. 152. But the opinion of the two judges allowed. 4 Co. 120. b.*

If a lease be upon condition to husband and wife, that if it comes to any other hand than their own, and their issues, the lessor shall re-enter; if the husband dies, and the wife takes another husband, the lessor shall re-enter. *Dub. Mo. 21.*

If a man leases for years upon condition, and afterwards leases by indenture for the same term to another, to commence immediately; this does not destroy the condition, for the second lease is good only by estoppel. *1 Rol. 472. l. 50.*

(R) CONDITION IN LAW ; WHAT IS.

A condition in law is that which the law implies without any express words of the party. *Co. L. 232. b.*

As to the estate of tenant by the curtesy, in dower, after possibility, for life, for years, by statute-merchant, staple, elegit, guardian, &c. a [*]condition is annexed by the law, that they do not alien in fee, &c. *Co. L. 233. b.*

To every estate, that it be not aliened in mortmain. *Co. L. 233. b.*

So to the estate of tenant by the curtesy, in dower, for life, years, &c. a condition is annexed, that they do not commit waste. *Ibid.*

So to a grant of an office of a parker, steward, bedel, bailiff of a manor, and other offices, a condition is annexed by law, that he do that which to his office appertains. *Lit. s. 378, 379.*

So by the st. 5 Ew. 6. 16. to offices which concern the administration or execution of justice, a condition is annexed, that he do not purchase or sell his office. Co. L. 234. a. Vide Officer, (K 1.)

So to all franchises a condition is annexed by law, that they be not misused. Mir. ch. 5. s. 4. 2 Inst. 223. D. Quo. War. 11, 12.

Who are bound by a condition in law. Vide ante, (A 10.)

(S) WHAT SHALL BE A BREACH OF A CONDITION IN LAW.

(S 1.) Dereliction of an office.

When an alienation by tenant by the curtesy, in dower, for life, years, &c. shall be a forfeiture, vide Forfeiture, (A 1, &c.)

When an alienation in mortmain, vide Capacity, (B 2, &c.)

When waste shall be a forfeiture. vide Waste, (F 1, 2.)

In all cases where an officer relinquishes his office, and refuses attendance, he forfeits his office. Co. L. 233. b. R. 9. Co. 50. b. Vide Officer, (K 2.)

So if an officer has a sentence against him in the star-chamber for bribery, and that he be incapable of any judicial office; his office is not lost by the sentence, for if he be pardoned, he may afterwards execute it. But if, after sentence, and before the pardon, he refuses attendance; it is a forfeiture. R. Cro. Car. 55.

(S 2.) Abusing his authority.

So, in all cases where an officer acts contrary to the duty of his office; it shall be a forfeiture; as, if a parker kills deer, &c. without warrant. Co. L. 233. b. R. 1 And. 29.

Or destroys the vert; as by cutting down, or felling of trees, wood, underwood, &c. Co. L. 233. b. 1 And. 29. R. Mod. 707. 787, 9.

Or pulls down the lodge, or other houses of the park. Co. L. 233. b. 1 And. 29.

Or surcharges the park by agistment, that the deer have not sufficient herbage. R. Mo. 787.

So if a parker refuses to execute the warrant of his master, or to permit it to be executed. Per two J. one cont. Mo. 9.

If by stat. an auditor be bound to shew his account before Hilary term annually, and does not do it; it shall be a forfeiture. Dy. 197. b.

So if an officer neglects that which by his patent he ought to do *sub pena forisfacturæ*; as, if he does not account, or pay money due upon an account at the time appointed by his patent. R. Dy. 211. a.

If he, who has an office of the custody of a house of the king denies him, who has the inheritance to inhabit there; it shall be a forfeiture. R. 2 Cro. 18. Mo. 787.

Otherwise, if his servants do it of their own head. R. 2 Cro. 18. Mo. 787.

So, in all public offices, which concern the administration of justice, [*]non-user, of itself, is a forfeiture. Co. L. 233. a. Vide Liberties, (C 1, 2.)

As absence in a philizer for two years. Dy. 114. b.

In a town clerk. 1 Sid. 14. Vide Franchises, (F 27.)

But absence involuntary, or for a reasonable cause, is not a forfeiture; as if a serjeant at arms makes a deputy by the king's licence by parol only. R. 9 Co. 99.

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So in private offices, non-user, if it be accompanied with any damage to the lord or master, is a forfeiture: as if a parker be absent for two or three days, and in his absence deer, &c. are killed. Co. L. 233. a.

So a voluntary neglect to attend, without a reasonable excuse of the absence, is a forfeiture of the office of serjeant at arms to the lord chancellor. R. 9 Co. 99. Dy. 198. a.

So non-attendance in his month of waiting, is forfeiture of the office of clerk of the signet. D. 1 Sid. 81.

And if the office was granted in reversion, non-attendance when the office is void, without notice of the death of the former officer. D. 1 Sid. 81.

So a private officer, who has only a certain fee to be paid by his master, may be discharged *ad libitum*. Co. L. 233. a.

But generally, non-user of a private office, without a special damage, is not a forfeiture. Ibid.

So a private officer cannot be discharged *ad libitum*, where he has profits belonging to his office, besides his fee; for a grantor cannot defeat his own grant: as a steward of a manor, &c. Co. L. 233. b.

So he cannot be discharged *ad libitum*, where his fee is not paid by the lord, but to be allowed out of the profits of his office. Ibid.

What charges, &c. shall be avoided by an entry for a forfeiture. Vide ante, (O 6.)

(T) LIMITATION; WHAT SHALL BE, [AND HOW EXPOUNDED.]

So if an estate be granted under a limitation, there is a condition in law, that if the contingency upon which the estate is limited happens, the estate determines.

As if an estate be granted to a woman *durante viduitate*. Co. L. 234. b. Jon. 58. [Vide Ambler, 209.]

Or *dum casta et sola vixerit*. Co. L. 234. b.

So *dummodo, quamdiu, donec, quousque*, &c. are words of limitation. Co. L. 235. a. 10 Co. 42. a. (n)

So where an estate is limited by way of use, it shall be a conditional limitation; though it would not be a condition by the common law. Pol. 78.

If a man, by his will, devises land to his heir, upon condition that he pays, or does such an act, &c., and for non-payment, &c. devises it [*]over; this shall be taken as a limitation, though there are express words of condition; for otherwise, the heir, who ought to enter for the condition broken, will take advantage of his own default. R. 1 Rol. 411. l. 30. 45. R. Ray. 237. R. 2 Mod. 7. Vide Ambler, 230.

So if an estate be devised for life, or years, upon condition, remainder over in fee; the words of condition shall be taken as a limitation; for otherwise, by entry for the condition broken the remainder will be destroyed. Cont. 10 Co. 40. b. Per Periam, acc. 1 Leo. 283. R. 2 Leo. 38. Ow. 8. 55. R. Cro. El. 919. 833. R. 2 Cro. 592. R. 1 Vent. 203. 1 Mod. 86.

[So if testator devise his estate to his wife for life, and after her death

(n) 1. The limitations of real property are, in general, technical. 2 T. R. 431.—2. If a limitation depends upon a prior estate which is void, the limitation falls with it. 2 T. R. 251.—3. A condition annexed to a life estate, that it should be void if the tenant charged that it should go over to the next in remainder, is valid. 5 T. R. 641.—4. A condition to determine a lease contained in a deed, cannot be discharged by a simple writing. 4 M. & S. 30.

to such child as she was then supposed to be *ensient* with, to the heirs of such child for ever, provided that if such child as shall happen to be born shall die before the age of 21 years, leaving no issue of its body, the reversion over: no child is born, this is a limitation of a remainder. 1 Wils. 105, 106.]

[So if a term be bequeathed to A. and his lawful heirs, and if he die and leave no lawful heir, then to B., the limitation to B. is good; for by "lawful heirs" is apparently meant "heirs of the body," and "leaving no lawful heir" must be confined to leaving no issue at the time of his death. 2 Term Rep. 720.] (o)

[If A. on the marriage of his eldest son B. settles a freehold lease held for the life of B. and others, in trust to permit B. to enjoy for life, then his intended wife for life, then, after being subject to a charge for younger children, in trust for the heirs-males of the body of B., and in default for the heirs-males of the body of A., and in default for the right heirs of A.; this limitation to the heirs-males of the body of A. is not a contingent remainder, but a limitation of the estate; and B. thus being in the nature of tenant in tail, and also tenant for life, may, on the death of his wife and son, bar the entail. 2 Atkins, 259.] (p)

[If A. devises his real estate to his heir at law B. and his heirs, on express condition that in three months after A.'s death he execute to his trustee a release, if not, to C., and B. dies in A.'s life-time, the estate goes to C. and not to the heir at law, for this is not a strict condition, but a conditional limitation. 1 Vezey, s. 420.]

So a devise of a house to A., provided that if he does not inhabit there, it shall be to the lord, will be a limitation. Dal. 117.

So express words of condition shall be taken for a limitation, if the nature of the case requires it. Eq. Abr. 105.

Yet if a remainder is not limited upon the non-performance of the [*]thing to be done by the condition, it shall be taken as a condition, and not as a limitation. Semb. 1 Rol. 411. l. 15. 412. l. 7.

So if an estate be to A. paying, &c.; and if he do not pay, to B.; and if he do not perform, to the mayor, &c.; the second limitation will be void; for it will be a possibility after a possibility. Semb. Cro. Car. 577.

So if a freehold or inheritance be devised with remainder over, upon condition, that if he do not go to Rome, &c. his estate shall cease, and shall go to him in remainder, it cannot be taken as a limitation, for a freehold cannot cease. Jon. 58.

CONDITION IN TERROREM. Vide CHANCERY, (2 Q 6.—3 Z 6, 7.)
Vide more of CONDITION, in CHANCERY, (2 Q 1, &c.—4 D 1, &c.)—ESTATES, (A 6, &c.)—OBLIGATION, (E).—USES, (K 4.)

(o) The words "children" and "issue," in their natural sense have the same meaning; but the words "children" and "heirs" have not. 3 T. R. 493.

(p) 1. There are two kinds of settlement; one by which the issue of the person to whom the first limitation is made shall certainly take, by giving the first taker only an estate for life; the other, by creating an estate in tail in the first instance. 4 T. R. 744.—2. A settlement on a child for life, with remainders to his first and other sons, in strict settlement, is in common parlance a settlement on the child; and the general intention of persons who look forward to future settlements is, that the estate shall be tied up as long as the rules of law will allow. 4 T. R. 749.—3. An estate settled by deed upon the husband and wife for life, remainder to the heirs "on" the body of the wife, by the husband to be begotten, is an estate in tail on both. Where the word is "of" instead of "on," it is an estate tail in the wife only; this difference is not founded upon reasoning but authority, since the same intention seems manifested by both. 2 T. R. 431.

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CONDUCT.

Vide ADMIRALTY, (E 8.)—PRÆROGATIVE, (B 5.)

CONFERENCE.

Vide PARLIAMENT, (G 24. 29.)

CONFESSION.

Vide INDICTMENT (K).—PLEADER, (G 3.—Q 5.—Y 2.—2 W 15.)

CONFIDENCE.

Vide CHANCERY, (4 W 1, &c.)

CONFIRMATION.

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(A) CONFIRMATION IN FACT; BY WHAT WORDS IT SHALL BE.

Confirmation is when a man confines a defeasible estate, or enlarges a particular estate. Co. L. 295. b.

And it is expressed or implied. Ibid.

By a confirmation express, or in fact, a voidable estate shall be confirmed, so that it cannot be avoided; as, if a disseisee confirms the estate of the disseisor. Vide Lit. s. 519.

And there needs not the word *confirmavi*; for if a man uses the word *dedi* or *concessi*, that amounts to a confirmation. Lit. s. 531.

So *demisi*. Co. L. 301. b.

So if a man says, *volo quod A. habeat* such land; that amounts to a confirmation. Ibid.

And a confirmation shall be good by sealing the deed, without livery, or other circumstance. Semb. Sav. 49.

So if patron and ordinary give licence to a parson to make a grant; that amounts to a confirmation. Co. L. 300. b.

So if parson and ordinary demise for years to the patron, who grants it over to B. This assignment amounts to a grant and confirmation also. Co. L. 302. a. 2 Rol. 9.

So if a disseisor grants a rent out of the land to the disseisee, who assigns it, and afterwards re-enters, that amounts to a grant and confirmation of the rent by the disseisee. Co. L. 302. a.

So if a disseisor grants the land to B. for life, or in tail, remainder to the disseisee, who grants over this remainder, to which the tenant for life attorns; that amounts to a confirmation by the disseisee of the remainder, and also of the particular estate. Co. L. 302. a.

So if the disseisee joins in a feoffment, &c. with the heir of the disseisor; that amounts to a confirmation by the disseisee. Lit. s. 534.

So if a donee in tail grants a rent in fee to him in remainder, who assigns it over; that amounts to a confirmation of the rent, if the donee dies without issue. Semb. 1 Rol. 482. l. 45.

So if a donee makes a lease not warranted by st. 32. H. 8. and dies, and the issue accepts the rent; that amounts to a confirmation. Vide Estates, (B 24. 32.)

So in every case where a lease is only voidable; as by an abbot, bishop, &c. 3 Co. 65. a. (q)

[*]But a surrender does not amount to a confirmation. Co. L. 301. b.

So if a man bargains and sells the reversion to lessee for years; that does not amount to a confirmation to enlarge his estate, if the bargain and sale be not inrolled. Dal. 37.

So if there be lessee for years, remainder to A. for life, the reversion to B. in fee; a charter of feoffment and livery, by B. to the lessee, being void as a feoffment, does not amount to a confirmation to enlarge the estate of the lessee. R. 1 Rol. 482. l. 40.

(q) Limitation by a deed to A. for life, remainder to B. for life, with intermediate remainders, remainder to the heirs of the body of B.; an act, on A.'s bankruptcy, vested in estates in trustees for payment of his debts, and gave the lands in question, after payment, &c. "to B. for life with such remainders over as were limited by the deed." The act enures, not to give B. a new estate, but to confirm the one she took under the deed. 2 H. Bl. 46.

So if a lease be absolutely void, acceptance of rent afterwards does not amount to a confirmation; as if a lease be, upon condition for non-payment to be void. Vide Condition, (P).

So if a parson, vicar, or prebendary leases for years, and dies, and the successor accepts the rent, it is not a confirmation, for the lease was void by his death. 3 Co. 65. a. Vide post, (D 1.)

If a bishop makes a lease, which needs confirmation by the dean and chapter, and dies before confirmation, and the rent be accepted by the successor, the lease shall not be affirmed. 2 Rol. 161.

What act by a woman, or one at full age, shall be a confirmation of an estate made during coverture or nonage. Vide Baron and Feme, (S 1.)—Enfant, (C 6.)

(B) HOW A CONFIRMATION SHALL ENURE.

(B 1.) When confirming the estate enures to the whole estate.

If a disseisee confirms the estate of the disseisor, it is good for ever. Lit. s. 519.

Though the confirmation was only for life, or for years, or for a day, &c. for he confirms his estate, which was a fee-simple. Lit. s. 519, 520.

So if a disseisor make a gift in tail, and the disseisee confirm the estate of the donee only for life, &c. this enures to confirm the whole estate-tail. Co. L. 296. b.

So if an estate of freehold be confirmed in part, or for a time, the whole estate is confirmed, for it is entire. Co. L. 297. a.

So if an estate be for years, and he confirms the demise or lease, or estate of the lessee, for part of the term; the addition of part of the term is void, for the demise or estate was confirmed before. Ibid.

So if a dean and chapter, &c. confirm a lease only for part of the term. R. 1 And. 47.

So if a disseisor makes a joint estate to A. and B. and the disseisee confirms the estate of B.; this enures to A., for the estate is confirmed, which was joint. Lit. s. 522. Co. L. 297. b.

So, if the estate of one joint-tenant be confirmed, that enures to his companion. Lit. s. 522.

Or if one joint-tenant confirms the estate of the other, it remains joint. Lit. s. 523.

If a disseisor makes a lease to A. and B. and to the heirs of B., and the disseisee confirms the estate of B. for life; this enures to A., and also to the fee of B., for he had the whole estate of the fee-simple in him. Co. L. 297. b.

So, if a disseisor makes a lease for life, &c. remainder to B. in fee, and the disseisee confirms the remainder; this enures to the benefit of the particular estate; for if this should be defeated, the remainder would be also defeated. Lit. s. 521.

[*]So, if he makes a lease for life, reserving the reversion to himself; a confirmation of the reversion enures to the lessee for life, for by entry upon him, the reversion would be destroyed. Co. L. 298. a.

(B 2.) When it enures only to part.

But sometimes by apt words a confirmation goes only to part of an estate; as if a disseisor or lessee for life, &c. makes a lease for 100 years; if the

disseisee or lessor does not confirm his estate or lease, but confirms the land to the lessee for fifty years. it is good for so many years. Co. L. 297. a.

So, if a lease be of forty acres, he may confirm it for twenty acres. Ibid.

So, if a disseisor makes a joint estate to two, and the disseisee confirms only the land to one ; he has the sole estate in the whole. Lit. s. 522.

So, if a disseisor makes a lease for life, &c. remainder to another ; a confirmation of the estate of the lessee does not enure to him in remainder. Lit. s. 521.

Or, if the remainder be to the same person ; as if a disseisor gives to B. in tail, remainder to the heirs of B., a confirmation of the estate-tail by the disseisee does not enure to the remainder. Co. L. 297. a.

(B 3.) When it enlarges the estate.

If a lessor confirms the estate of a lessee for years *habend'* the said land to him for life ; this gives to him an estate for life. Lit. s. 532.

So, if he confirms it, *habend'* the land to him and the heirs of his body, or his heirs generally he has an estate-tail, or in fee. Lit. s. 533. Co. L. 299. a.

So, if a man seized of a rent in fee, grants it for life, and afterwards confirms the estate of the grantee, *habend'* the rent to him and his heirs, the grantee has a fee. Lit. s. 549.

But if a man confirms the estate of a lessee for life, &c. *habend'* his estate to him and his heirs ; this does not enlarge the estate, for the estate for life cannot go to his heirs. Co. L. 299. a.

So, if a rent be granted *de novo* for life, and the grantor confirms the estate of the grantee to him and his heirs, this does not enlarge his estate. Lit. s. 548.

And where a confirmation enlarges the estate, there ought to be privity between him who confirms, and him who takes the confirmation. Co. L. 296. a.

And therefore a confirmation by a lessor to a lessee for life and a stranger, is void to the stranger. 1 Rol. 482. l. 27.

So, a confirmation to enlarge an estate, who has only a right to the reversion, is not good. 1 Rol. 482. l. 20.

But if a woman, lessee for life, takes husband ; the lessor, by confirmation to the husband, may enlarge his estate ; for there is a sufficient privity. Co. L. 299. a.

(B 4.) How a confirmation, which enlarges an estate, operates.

If a husband has an estate for life in right of his wife, a confirmation [*] to the husband and his heirs gives him the fee, after the death of his wife. Co. L. 299. a.

If the confirmation be to husband and wife for their lives ; this gives to the husband a remainder or interest for his life, after the death of his wife. Lit. s. 525.

If it be to husband and wife, and their heirs ; they have a joint fee-simple. Co. L. 299. b.

If an estate was granted to husband and wife, *habend'* one moiety to the husband, and the other moiety to the wife, and a confirmation be to the husband and wife and their heirs ; the husband has one moiety in fee, and the husband and wife are joint-tenants of the fee in the other moiety. Ibid.

If a woman, lessee for years, takes husband, and a confirmation be to
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them for their lives ; they are joint-tenants for life, for the term is merged in the freehold. Lit. s. 526.

So usually the confirmation enures according to the quality of the estate ; and, therefore, if there are tenants in common for life, and a confirmation be to them and their heirs they have the fee in common. Co. L. 299. b.

If a lease be to A. for life, remainder to B. for life ; a confirmation to them and their heirs gives a moiety to A. for life, remainder to B. for life, remainder to A. in fee ; and the other moiety to A. for life, remainder to B. in fee. Ibid.

If a gift in tail be to A. and B., a confirmation to them and their heirs, gives the fee to them in common ; for it follows the inheritance in them before, which they had in common. Ibid.

(C) WHEN A CONFIRMATION IS EFFECTUAL.

(C 1.) Though it wants privity.

A confirmation which does not enlarge the estate, shall be good, though there be no privity ; as if lessee for life demises for years, and the lessor confirms the estate of the lessee for years. Lit. s. 516, 517.

Or a disseisee confirms a lease by the disseisor. Lit. s. 518.

If an infant leases for years to B., who grants the land for part of the years to another, and the lessor at his full age confirms it. Lit. s. 547.

Otherwise where a confirmation enlarges the estate. Vide ante, (B 3.)

Or abridges the services. Vide post, (D 3.)

(C 2.) Though the estate is gone, out of which the grant confirmed was derived.

So, if a disseisor grants a rent-charge, &c. and the disseisee confirms it, and afterwards enters upon the disseisor ; the rent remains, though the estate out of which it issued be gone. Lit. s. 527. Co. L. 300. a.

So, if the heir of the disseisor grants a rent, and the disseisee confirms it, and afterwards recovers the land ; though the entry of the disseisee was not congeable at the time of the confirmation. Co. L. 300. a.

So, if feoffee upon condition grants a rent, which the feoffor confirms, and afterwards enters for the condition broken. Ibid.

[*]So, if a lessee for life grants a rent in fee, and the lessor confirms it ; the rent remains, though the estate for life be determined. Lit. s. 529. 1 Rol. 483. l. 25. 30.

So, if lessee for life upon condition, grants it, and afterwards the condition is broken. Co. L. 301. a.

But if the person who confirmed had only a particular estate, his confirmation determines with his estate ; as if a patron, being only tenant for the life of B., confirms a lease of the parson, the confirmation is gone when B. dies. 2 Rol. 9.

(D) WHEN A CONFIRMATION IS NOT GOOD.

(D 1.) If it be of a void thing.

But a confirmation of a void thing avails nothing ; as if B. takes from another his villein in gross, who confirms to B. his estate in his villein : it is of no avail, for he had not any estate in him. Lit. s. 541.

If a bishop in Ireland *de facto*, where there is another rightful bishop

alive, leases for years, and the lease is confirmed by the dean and chapter ; yet the lease is not good after the death of the lessor. R. 2 Cro. 553, 4.

So, if a disseisee before Mich. confirms the estate of a lessee by a lease by the disseisor, made to commence after Mich. ; for the lessee then had only *interesse termini*. Co. L. 296. b.

If a bishop collates to a prebend, and dies, and before induction the king confirms it ; it is void, for he had nothing in the prebend till induction. 1 Rol. 483. l. 15. Vide post, (D 5.)

So a confirmation of a void lease does not make it good. Dy. 239. b. Vide Baron and Feme, (S 1.)—Enfant, (C 7.)—Ante, (A).

Yet by a confirmation by act of parliament, a thing void shall be made effectual : as a void patent. 1 Rol. 483. l. 5. Semb. cont. where a void custom was confirmed. Hard. 41. where the parliament confirms only a void act. Pl. Com. 399.

Otherwise, if the parliament confirms the thing done, as a grant, lease, attainer, &c. which would be void without such confirmation. Pl. Com. 399.

[So, where the king's intention to grant, appears, it shall be good, though it be contained in a confirmation of a void grant. 1 Ld. Rd. 300.]

(D 2.) Does not give collateral qualities.

So a confirmation gives nothing but the right to that, which he to whom the confirmation is made, had before : as if the lord confirms the estate of his tenant, yet his seigniority remains. Lit. s. 535.

So, if he who has a rent, common, &c. out of land, confirms the estate of the terre-tenant, his rent, common, &c. remains. Lit. s. 536, 537.

So, a confirmation does not give any collateral qualities : and therefore, if a husband alone levies a fine, where husband and wife are seised in special tail, remainder to the husband in fee, and the conusee confirms the estate of the wife ; this does not make her estate descendible to the issues, who are barred by the fine. R. 9 Co. 142.

[*](D 3.) Nor extinguishes a right, &c. in suspense.

So a confirmation does not give nor extinguish a right or interest in the confirmer, which was suspended ; as if the disseisee and a stranger disseise the heir of the disseisor, and the disseisee confirms the estate of his companion, this does not extinguish his right, which was suspended. Co. L. 298, b.

So, if he who has a rent, &c. out of land, and a stranger disseise the terre-tenant, and the grantee of the rent confirms the estate of the stranger, and afterwards the disseisee re-enters ; the rent is revived, for it was suspended at the time of the confirmation. Ibid.

So by a confirmation a man cannot make a reservation to himself, as if a lord confirms the estate of his tenants, he cannot reserve new services. Lit. s. 539.

If queen Elizabeth grants a college two manors rendering rent, and her successor confirms the grant rendering the same rent, it shall not be a double rent, for a rent upon a confirmation is void, though it be in the case of the king. R. Hard. 167.

But by confirmation a man may abridge his former services : as, if the tenant holds by fealty and 20s. rent, the lord may confirm his estate to hold only by 12*l.* rent. Lit. s. 538.

Or to hold by frankalmoigne : for this is a discharge of the other services, rather than a reservation of a new service. Lit. s. 540.

Yet, to such a confirmation as abridges services, privity is necessary. Co. L. 305. b.

And, therefore, if there be lord, mesne, and tenant, the lord cannot abridge the services of the tenant. Ibid.

So, if a man has a rent-charge or common in the land of another, by confirmation to the terre-tenant, his rent or common shall not be diminished or abridged. Co. L. 305. a.

(D 4.) So a confirmation is not good, when made by him who has nothing.

So, a confirmation by him who has nothing at the time is worth nothing. 1 Rol. 482. l. 8.

As, if tenant in tail and the issue in tail join in a grant of the next avoidance, and the tenant in tail dies: this is not a confirmation by the issue in tail, for he had nothing at the time. R. 1 Rol. 482. l. 10.

(D 5.) So it shall not have relation to the prejudice of another.

So a confirmation shall not have relation to the prejudice of another; as if a parson makes a lease, and afterwards the patron being bishop grants the next avoidance to A. and it is confirmed by the dean and chapter, and afterwards the lease is by them confirmed the presentee of A. shall avoid the lease, for the grant to A. was before the confirmation of the lease. R. Hob. 7.

So the subsequent presentee shall avoid it; for being avoided by the presentee of A. it shall be void as to all his successors. Hob. 7.

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(A) HOW ASSEMBLED.

The convocation ought to be summoned only by the king's writ.

By the st. 25 H. 8. 16. it was enacted, that it shall always be so assembled, and declared by the clergy that it ought so to be. 4 Inst. 322.

[*]And it cannot assemble without the king's licence. R. 12 Co. 72.

And the convocation is under the power and authority of the king. Per three J. 21 Ed. 4. 45. b.

And, therefore, at every parliament from the 22d Ed. 3. there was this
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clause inserted in the writ directed to every archbishop and bishop, viz. *præmunientes priorem & capitulum (vel decanum & capitulum) archidiaconos, totumq; clerum dioceseos vestrae, quod iidem prior (vel decanus) & archidiaconi in propriis personis, dictumque capitulum per unum. idemque clerus per duos procuratores, &c. intersint, &c.* Dugd. Sum. 233. 235, &c. 4 Inst. 4.

The archbishop of Canterbury and archbishop of York make their convocations and grants severally. 21 Ed. 4. 46. b.

(B) WHO OUGHT TO ASSEMBLE.

In a convocation all the clergy of the province are present, in person, or by representation. 4 Inst. 322. 21 Ed. 4. 55.

The archbishops and bishops meet in the upper house; the deans, archdeacons, and proctors of the clergy in the lower. 4 Inst. 322.

(C) THE PRIVILEGES.

By the st. 8 H. 6. 1. all the clergy called to convocation by the king's writ, their servants and familiars, shall enjoy the liberty in coming, tarrying, and returning, as the commonalty called to parliament enjoy.

(D) THE JURISDICTION.

The convocation has jurisdiction in *mere spiritualibus*; as heresy, schism, &c. 4 Inst. 322. Vide Heresy, (B 1.)

To make fasting-days, holy days, &c. 21 Ed. 4. 45.

In causes ecclesiastical, if the king be concerned, there shall be an appeal to the upper house of convocation. 4 Inst. 339, 340. Vide Prerogative, (D 15.)

But the convocation has no power to bind the temporalty, but only the spirituality. 21 Ed. 4. 45.

(E) HOW THEY MAKE CANONS.

By the st. 25 H. 8. 19. the clergy shall not attempt, claim, &c. nor enact or execute, any canons, &c. in their convocation, unless they have the king's licence to make and execute them, on pain of fine and imprisonment. Vide Canons.

And, therefore, though they be assembled in convocation by the king's licence, they cannot afterwards confer to make canons, &c. without a special licence for such purpose. R. 12 Co. 72.

So after canons are made in convocation by the king's licence, they cannot be executed before the royal assent to them. R. 12 Co. 72.

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(A) COPYHOLDER.

(A 1.) Who is.

A copyholder is one, who within a manor, in which there is a custom time whereof, &c. for such tenure, holds lands or tenements to him and his heirs, in tail, or for life, &c. at the will of the lord, according to the custom of the manor. Co. L. 58. Lit. s. 73.

And he is called a copyholder, because he holds his land by copy of court roll of the same manor. Co. L. 58. a.

Of ancient times they were called tenants in villenage, or by base tenure, because they held generally by villein service. F. N. B. 12. Co. L. 58. a. 62. 2 Brown. 77. [Dougl. 724. 4. 2. contra.]

But they are called copyholders, 1 H. 5. 11.

Tenants by the verge, 14 H. 434. Lit. s. 78.

Tenants by roll at the will of the lord, 42 Ed. 3. 25.

Customary tenants, by the st. 4 Ed. 1. *extent. manerii.*

After tenants, 2 Rol. 236.

[Formerly copyhold estates were mere tenancies at will, a middle estate between freeholders and villeins; but by length of time, they acquired stability by custom. 1 Burr. 1543.]

(A 2.) What estate he has.

Though a copyholder has an estate at the will of the lord, yet it is according to the custom of the manor. 4 Co. 21.

And therefore the lord cannot oust him, if he observes the customs of the manor. Co. L. 60. b. 62. b. 63. 2 Co. 17. a. R. 4 Co. 21. b. 24. b. 24. Cro. El. 103. 1 Rol. 510. l. 25.

And if he be ousted contrary to the custom, he shall not only sue by petition to the lord, but may have trespass against him. Co. L. 60. b. 62. b. Per Danby, 7 Ed. 4. 19. Per Brian, 21 Ed. 4. 80. Dal. 62.

So the lord cannot do any act to determine his interest; and therefore, if the king being lord of a manor grants land by copy, and afterwards grants the fee of the same land by patent; the interest of the copyholder is not destroyed. R. 2 Co. 17. a. Lane. R. 4 Co. 24. b. Murrel.

So, if the lord of a manor, in which by custom the wife of a copyholder shall have dower without other admittance, grants the freehold of a copyhold to A. for the life of the copyholder, and afterwards to the copyholder himself in fee: the estate of the wife is not destroyed, because the copyholder continued his copyhold interest for his life. R. Hob. 181. 1 Rol. 510. l. 40. R. 2 Cro. 126.

But a copyholder has no estate of freehold; for that remains in the lord. Lit. s. 81. 2 Inst. 325.

[*](B) COPYHOLD, WHAT.

(B 1.) Ought to be time out of mind.

A copyhold ought to be time whereof, &c. for it cannot begin at this day. Co. L. 58. b. (r)

And, therefore, if the lord grants land by copy, which has not been so granted before, it is no copyhold. R. 1 Leo. 56.

Though it continues in grant by copy for forty-seven years. R. 3 Leo. 107.

And, if the lord afterwards grants it by copy for a further term of years; he may enter as upon a tenant at will. R. 3 Leo. 108. (s)

But a continuance in grant by copy for fifty or sixty years, fixes a customary interest, if it be without interruption. Semb. 3 Leo. 107.

Yet where a grant was 10 H. 8. and the lord entered 23 H. 8. for a forfeiture, and afterwards it continued in grant by copy till 8 Eliz.; that was an interruption, and it shall be computed in grant by copy only from 23 H. 8. which being but forty-seven years will not fix a customary interest. R. 3 Leo. 107. (t)

(B 2.) Within a manor.

It ought to be parcel of a manor, or within a manor. Co. L. 58. b.

(r) A copyhold cannot be created at this day, either by act of the party, or by operation of law, since neither can annex to the land that immemorial custom which is the essence of a copyhold. 1 T. R. 466. If it could be created by act of parliament, it must be in this way: the act would estop every one from questioning that the land had been copyhold time out of mind. 2 T. R. 415.

(s) The lord, when warranted by custom, may grant the waste of the manor as copyhold, and thereby effectually create a new copyhold tenure. 3 B. & P. 346.

(t) A grant of parcel of the waste of a manor to a copyholder and his heirs, by way of increase to his copyhold tenement, to be held of the lord at his will, subject to the same services, &c. with the copyhold, and for which the grantee paid a fine to the lord, and fees to the steward, will operate neither.—1. As the grant of a copyhold; 2. Nor as freehold of inheritance. 1. Not of a copyhold, because without a special custom copyhold cannot be created at this day. 2. Nor of a freehold inheritance, since that can only be created by feoffment, lease and release, &c. 2 M. & S. 504.

But it is not necessary that it continue parcel of the manor; for if the lord grants the inheritance of all the copyholds within his manor, whereby they are severed from the manor, yet the copyholds remain. R. 4 Co. 26. b. Cro. El. 103.

And the grantee shall hold customary courts, and take surrenders, and grant by copy, though he cannot hold a court-baron. R. 4 Co. 26. b. But semb. cont. Cro. El. 103.

So, if the lord demises the freehold of all the copyholds within his manor for 2000 years; the copyholds remain, and the lessee shall hold customary courts, &c. R. 4 Co. 26. b. Neale. Cro. El. 395.

So, if the lord grants the inheritance of one copyhold, it remains copyhold, and shall pay rents, heriots, and other services to the feoffee, and shall be subject to forfeiture for alienation, waste, &c. as before. R. 4 Co. 24. b. 25. Murrel. R. 2 Leo. 208.

Yet the feoffee cannot hold a court, take a surrender, or make an admittance. R. 4 Co. 25.

[*]And the copyholder has no way to sell, but by a decree in Chancery. 4 Co. 25.

Or, he may surrender to the use of the same feoffee. Per Fenner, Cro. El. 252.

(B 3.) Always demisable.

So, a copyhold ought to be at all times demised, or demisable, by copy. Co. L. 58. b. [2 Term Rep. 415. 705.] Vide post, (L).

But it is sufficient if it be demisable, though it was not always demised. Ibid.

Though leased at will only. 4 Co. 31.

And therefore, if the lord holds a copyhold, which escheated to him, in his hands for many years, he may afterwards demise it by copy. Co. L. 58. b. 4 Co. 31. a. R. Cro. El. 699. 1 Rol. 498. l. 40.

So, if it comes into his hands by any other means. 4 Co. 31. a. French.

And his heir, or assignee, may afterwards re-grant it by copy. 4 Co. 31. a.

So, if a copyholder takes a lease, or other estate of the manor or of his copyhold, whereby his copyhold is destroyed, yet the land may afterwards be granted by copy; for it was always demisable. Ag. 4 Co. 31. b. Sav. 70. (Vide 1 Rol. 498. l. 30. Semb. cont.)

So, if the lord, after a copyhold escheats, &c. demises the manor, and the escheated tenement by express words, yet it may afterwards be granted by copy; for the demise of the manor includes the escheated copyhold as parcel of the demesnes, and the naming of it signifies nothing. R. Cro. Car. 521. Vide Jon. 449. (Semb. cont.)

But, if the lord leases such copyhold for life, or years, or conveys it for any other estate (except at will) by deed, or without deed, it cannot afterwards be re-granted by copy; for it was not always demisable. R. 4 Co. 31. a. Vide post, (L).

So, if he makes a feoffment, and afterwards enters for a condition broken. 4 Co. 31. a.

So, if the wife of a lord has been endowed of it. Ibid.

Or, it has been extended upon a statute, or recognizance acknowledged by the lord. Ibid.

So, if the king, being lord, by letters patents grants an escheated copyhold, &c. not knowing of it, though he was deceived. 1 Rol. 498. l. 30. Jon. 449. Cont. 2 Dan. 176. R. cont. 2 Rol. 197. l. 5. Vide post, (L).

So, if the lord grants land to a copyholder, by bill under his hand, for his life. 1 And. 199.

Yet, if by a tortious act it has been sometimes not demisable, when such act is avoided, it may be re-granted by copy: as, if a copyholder be ousted and the lord disseised, and there be a descent after the disseisin, yet after recontinuance, it may be granted by copy. 4 Co. 31. a.

So, if a copyhold has been recovered by a false verdict, or an erroneous judgment. Ibid.

So, if a husband seised of a manor in right of his wife grants by indenture an escheated copyhold, &c. the wife after his death may re-grant it by copy. Per two J. Cro. El. 459. 2 Rol. 271. l. 25.

[*]So, if tenant for life leases by indenture, the reversion may be regrant-
ed. Per two J. Cro. El. 459. 2 Rol. 271. l. 20.

Or, if tenant in tail leases. 2 Rol. 271. l. 24.

Or, lessee for years of a copyhold. 2 Rol. 271. l. 15.

(C 1.) WHAT TENEMENTS ARE GRANTABLE BY COPY.

A manor may be granted by copy. Co. L. 58. b. R. 11 Co. 17. b. Nevil. 2 Cro. 327. 260. Yel. 191.

So, all lands and tenements within the manor. Co. L. 58. b.

So, the herbage and *vestura terræ*. Co. L. 58. b. R. 4 Co. 30. b. Hoe. *Tonsura terræ*. Per Gawdy. 1 Rol. 498. l. 15.

So, tithes; for they may be parcel of a manor, as well as a rent-charge. Dub. Cro. El. 814. R. Cro. El. 413. Per Rol. 1 Rol. 498. l. 10. Mo. 355.

So, underwood without the soil. R. 4 Co. 30. Hoe. Co. L. 58. b. Cro. El. 413. Mo. 355.

And the lord cannot take underwood there in common. R. Cro. El. 413. Mo. 355.

So, a mill. R. 4 Leo. 241.

So, every thing that concerns lands and tenements: as, a fair appendant to a manor. Co. L. 58. b. Mo. 355.

And a market. Cro. El. 413. Mo. 355.

And a fishery. Mo. 355.

And common. D. Cro. El. 814.

But where a manor is granted by copy, it cannot have freeholders, or a court-baron, but a customary court for the admission of copyholders. R. 2 Cro. 260. Adm. 2 Cro. 327.

Nor shall have forfeiture of the tenements. 2 Cro. 260.

Nor hold plea in writ of right. Ibid.

(C 2.) How granted.

If the lord grants a copyhold upon a surrender, he ought to grant it according to the intent of the surrender.

And he cannot increase the rent or services, or add a condition. 2 Rol. 236.

But where a copyhold comes to the lord by escheat, forfeiture, &c. he may grant it *de novo* by copy, rendering a greater rent. 2 Rol. 236.

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(C 3.) What lord may grant.—*Dominus pro tempore.*

Every one having a lawful interest in a manor, may make voluntary grants of copyholds escheated, or come to his hands, as well as admittances, rendering the ancient rents and services, which bind him who has the inheritance. 4 Co. 23. b. Co. L. 58. b. Mo. 112.

As, tenant in fee or tail. 4 Co. 23. b.

Tenant for life. R. 4 Co. 23. b.

Tenant by curtesy. 4 Co. 23. b.

Tenant in dower. Ibid.

Tenant by statute-merchant, staple, or *elegit*. 4 Co. 23. b. Co. L. 58. b.

Tenant for years. 4 Co. 23. b. Co. L. 58. b. R. Mod. Ca. 63.

[*]Guardian in chivalry, or socage. 4 Co. 23. b. Co. L. 58. b. R. Ow. 115. 2 Cro. 55. 98. 1 Rol. 499. l. 23. Godb. 143.

Tenant at will of a manor; for the copyholder is in by the custom, without regard to the person, or estate, of the lord. 4 Co. 23. b. Co. L. 58. b. Agr. 6 Co. 60. b.

Feoffee upon condition may make voluntary grants, which stand after the condition broken. R. 4 Co. 24. a.

So, grants by a bishop bind his successor, and the king when the temporalities are in his hand. 4 Co. 21. 23. b.

So, grants by a prebendary, parson, &c. bind for ever. 4 Co. 23. b.

So, if the lord takes a wife, who is entitled to dower by the marriage, and afterwards makes a voluntary grant; this binds the wife after the death of her husband. R. 4 Co. 24. a. R. 8 Co. 63. b. cont. Mo. 94. R. acc. Mo. 812.

So, if an infant makes voluntary grants, they bind for ever. 4 Co. 23. b.

Or an idiot, or *non compos*. Ibid.

So, a lunatic by his steward. 2 Dan. 178.

So, when a reversion is demisable by copy, tenant in dower may grant it by copy, as well as the possession; and the grant binds the heir. R. 1 Rol. 499. l. 20. Cro. El. 662.

So, every other particular tenant of a manor. R. Mo. 147. Cro. El. 662. Godb. 143.

And the grant is good, though the reversion does not fall in possession during the estate of the lord who made the grant. Cont. per all the judges except two. Mo. 95. Acc. per two J. Cro. El. 662. R. 2 Rol. 41. l. 12. 2 Co. 99. R. 1 Rol. 449. l. 20.

And if a copyholder by custom has estovers, common, &c. appurtenant to his copyhold, and the lessee for years, &c. excepting wood, waste, &c. whereby they are severed from the manor, makes a voluntary grant, the grantee shall have common, estovers, &c. as before; for he is not in by the lord, but paramount. R. 8 Co. 63. Mo. 812.

But tenant at will of a manor cannot grant a copyholder licence to alien for years. R. 8 Jac. 1 Rol. 511. l. 10.

And if tenant for life of a manor grants a licence to alien for years, it determines at his death. R. 1 Rol. 511. l. 15.

So, if an husband is seised in right of his wife, the wife ought to join in the grant. 2 Cro. 99.

So, if a copyhold comes to the lord by forfeiture, escheat, &c. and he binds himself in a statute, and afterwards re-grants the copyhold, it shall be liable to the statute. R. Mo. 94. 1 Lec. 4.

So, if the lord grants a rent-charge, and afterwards re-grants a copyhold, it shall be liable to the rent. R. 2 Leo. 152. 3 Leo. 59.

So, if the lord grants a rent-charge, and afterwards a copyhold escheats, &c. and the lord re-grants it, it shall be liable to the rent. R. Dy. 270. b. R. cont. 2 Brownl. 208.

But if a copyholder surrenders to the lord, to the use of A., and the lord admits him; A. shall not be liable to the statute or charge of the lord. R. 1 Leo. 4. Dy. 270. b.

(C 4.) By wrong, &c.

So tenant of a manor by wrong, or defeasible title, may make an admittance upon a surrender, which will bind him who has the right; [*]for this is a lawful act, to which he is compellable in equity; as, a disseisor, abator, or intruder. 4 Co. 24. a. Co. L. 58. b.

Feoffee of a disseisor. 4 Co. 24. a.

Tenant by sufferance. R. 4 Co. 24. 2 Leo. 46, 7.

Devisee, though afterwards the devisor be found *non compos*. Per Popham, Ow. 28. R. 2 Leo. 46, 7.

Though a surrender be to the disseisor *ut dominus faciat voluntatem suam*, whereupon he grants it to A. in tail according to the intent of the surrender. Q. 1 Rol. 503. l. 25.

But a lord by defeasible title cannot make voluntary grants to bind him who has the right. Co. L. 58. b. 4 Co. 23. b. Ow. 28. R. 4 Co. 24. a. Rous. Mo. 236.

So, he cannot admit to a greater estate upon a surrender than the surrenderer can give; and therefore if tenant for life, or in tail, surrenders to a disseisor to the use of A. for life, or in tail, and the disseisor admits accordingly, this does not bind the disseisee. 1 Rol. 503. l. 27.

So, he cannot accept a surrender to the use of himself, but such surrender will be void; as, an executor *de son tort* cannot retain for his own debt. R. 2 Jon. 153. 1 Vent. 359. 2 Mod. 287.

And if a lord, who has a defeasible title, makes a voluntary grant, entry or recovery of the manor by the disseisee avoids it. R. Poph. 71.

So, if a devisee for payment of debts makes a grant, and the wife is endowed of the third part of the manor, and this copyhold is assigned for her third, she shall avoid the grant. R. Dy. 251. a.

(C 5.) What steward may grant.

A grant by any steward, who has colour of title, is good; and therefore, if two are joint stewards of a manor by patent, and one of them holds a court and makes grants, it is sufficient. R. Mo. 112.

So, if the clerk of a steward holds a court, and makes grants; for the tenants cannot examine his authority, neither need he give them an account of it. Ibid.

So, if there be a steward *ad exequend' per se aut deput'*, and he makes a deputy *pro hac vice*. R. Cro. El. 48.

So, if a deputy of a steward deposes another, who holds courts and makes grants; though he has no title, for a deputy cannot make a deputy. R. in B. R. 12 W. 3. inter Parker and Keck. R. 1 Leo. 288. Vide Salk. 95. Comyns's Rep. 84.

So, if a deputy, to take a surrender to A. in fee, takes surrenders, which are not pursuant to his authority; yet it is sufficient. R. 1 Leo. 289.

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So, if a deputation be to take a surrender to A. in fee, and he takes a conditional surrender, it is sufficient. R. 1 Leo. 289. Adm. Cro. El. 48.

But a grant by a steward, contrary to the command of the lord, is void. Per Poph. Cro. El. 699.

Or, by less services. Cro. El. 699.

Yet a grant by the king's steward of a copyhold escheated, without warrant, is good, though not agreeable to his duty. R. 4 Co. 30. a.

[*](C 6.) By what words.

A grant to A. *habendum* to him and his wife, is void to the wife, she being named only after the *habendum*. R. 1 Rol. 67. l. 45. Vide post, (F 6.)

So, a grant to A. *habendum* to him, his wife, and son, is void to the wife and son. R. 2 Rol. 68. l. 10.

So, a grant to A. and his son, who has several sons, is void for uncertainty. R. 2 Cro. 374.

Otherwise, if it be averred that A. had but one son. R. 2 Cro. 374.

(C 7.) What estate.—In fee.

The lord may grant a copyhold to hold to a man and his heirs in fee-simple. Lit. s. 73.

So, a copyhold may be granted to A. and his heirs, upon condition, that he pay 100*l.*, to B., and if he does not pay, to B. and his heirs. Per Beaumont, Cro. El. 361. Semb. 1 Rol. 137. 254.

So, it may be granted to several and their heirs, by which they are joint-tenants.

And if it be granted to four and their heirs, equally to be divided, they are joint tenants, and not tenants in common. Per Holt, but two J. cont. in B. R. inter Fisher and Wigg, T. 12 W. 3. Vide Sal. 391. (Comyns's Rep. 88.)

(C 8.) In tail.

So, by custom, co-operating with the st. W. 2. 1. *de donis*, a copyhold may be granted in tail. Lit. s. 73. Co. L. 60. a. b. Adm. 1 Sid. 314. R. 3 Co. 8. Mo. 128. Per two J. Poph. 34, 35. R. Poph. 128. Semb. 1 Rol. 48. R. Cart. 22. D. 2 Brow. 77. 44. R. 1 Rol. 838. l. 20. (u)

And if a custom allows a grant to a man and his heirs, it warrants also a grant to him and the heirs of his body. R. 4. 23. Gravenor. Co. L. 52. b. Poph. 35. Semble per Holt, M. 2 Ann. Vide 6 Mod. 63. 66.

But it is no evidence of a custom to make a grant in tail, that land was used to be granted to a man, and the heirs of his body, unless there has been also a remainder after such estate. Co. L. 60. b.

Or, the issue has voided the alienation of his ancestor. Ibid.

Or, has recovered in *formedon in discender*, &c. Ibid.

And it seems, that the st. *de donis*, without a custom, does not make an entail; for it does not extend to copyholds. Co. L. 60. a. R. 3 Co. 8. Vide post, (N). R. Cro. El. 717. Godb. 369.

[A copyhold to husband for life, wife for life, heirs of the bodies of husband and wife, remainder in fee to the survivor, is an estate-tail after possibility of issue extinct in the wife who survives, and the estate vests in the person who is heir of the body of both husband and wife. 2 Atkyns, 101.]

(u) Copyholds are neither within the statute *de donis*, nor that of-uses; nor can they be entailed without a custom. 5 T. R. 111.

[*](C 9.) Estate tail how barred.

But if by the custom a copyhold may be entailed, it may also be barred. Co. L. 60. b. Ag. 1 Rol. 49.

And therefore, a common recovery may be in the lord's court to bar such entail. Dub. 4 Co. 23. a. Cro. El. 372. 391. R. 1 Rol. 506. l. 10. Agr. Mo. 753. 358.

Though there be not any special custom to warrant such recovery. R. 1 Rol. 506. l. 20. D. Mo. 358. Per Holt obiter in the case of Hunt and Bourn. (Vide Sal. 340.)

So, by custom, it is a good bar to an entail, that a copyholder commits a forfeiture by alienating without licence, and the forfeiture is presented in court, and thereupon the lord seizes it, and afterwards makes a grant to A. and his heirs, for whose benefit the forfeiture was intended. R. 2 Sand. 422. 1 Sid. 314. Dub. Sti. 450.

Or, that a copyholder surrenders to A. and his heirs, who shall commit a forfeiture, &c. R. 1 Sid. 314.

In such case the lord cannot admit any other, than the person for whose benefit the forfeiture was intended. R. 2 Sand. 422.

And if the lord does otherwise, a purchaser shall avoid all mesne acts when he is admitted, as well as upon a surrender. 2 Sand. 422.

So, a copyhold in tail shall be barred, by acceptance of a feoffment from the lord, and afterwards a fine levied at common law. R. Cart. 23. Vide post, (N).

Though there be a custom, that it shall be barred by forfeiture, *et non aliter*; for such custom (as to the *non aliter*) is void. R. Cart. 23.

But an entail cannot be barred by surrender only; for a custom to bar by surrender alone, is void. Per Coke, Lo. 188. Cont. if the custom allows it. Semb. Poph. 129. 2 Brow. 121.

[There may be a good custom in a manor, that tenant in tail may surrender, and bar his issue, without suffering recovery; or that he may suffer recovery in the manor court, and have the same effect. Str. 1197. Wils. 26.]

[In a manor where copyhold may be entailed either by special custom, or by the general doctrine of surrender in fee, *vel aliter*, &c. if a custom does not appear to bar by recovery in that manor, it may be barred by surrender: for otherwise it would create a perpetuity. 2 Vezey sen. 596.]

[And this surrender to the use of the will only. Ibid. 2 Vezey sen. 603.]

[By custom, it may be barred by surrender, and wherever tenant in tail of a freehold can bar the estate by any means, there tenant in tail of such copyhold may bar by surrender. 2 B. M. 969. 980. Vide Ambler, 279.]

[In such manor, if A. devises to his son B. and C. his wife, and the heirs of the body of B. on C. begotten; this estate may be barred by surrender of B. alone. Ibid.] (u)

[*]If a common recovery is erroneous, it cannot be reversed but by a petition to the lord, in nature of a writ of error. Adm. Ca. Parl. 67.

(u) 1. An equitable estate tail of a copyhold, cannot be barred by the devise alone of the tenant in tail. 1 H. Bl. 447.—2. Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the lord. The premises descended upon the eldest son, who by will charged all his real estates with debts and legacies, and devised it to his brother for life, with various remainders. The estates in the copyhold are barred. 2 Ves. 524.

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And if the lord refuse to receive such petition, he shall not be compelled to it in equity. R. in Ch. upon dem. to a bill, and affirmed in Parliament. Ca. Parl. 67. R. 1 Ver. 368.

Recovery in value shall be only of other copyhold in the same manor. Mo. 359.(x)

(C 10.) For life, &c.

So, custom allows a grant of copyhold for life. Lit. s. 73.

And when, by custom, a grant may be to a man and his heirs, the same custom warrants a grant of any less estate, as for life, &c. though there never was such a grant before. R. Co. L. 52. b. 4 Co. 23. Gravenor. R. 1 Leo. 56.

Though the custom says, that there shall be a grant in fee *solummodo*; for that cannot restrain what is incident by law. R. 1 Rol. 511. l. 30.

So, by a custom allowing a grant for three lives; it may be granted to three for the lives of two. R. 1 Rol. 511. l. 40.

Or for two lives, or one life. Per Poph. 35.

Or to one for the life of himself, and two others *successive*. R. 1 Sal. 188.

But a grant to A. for his life, remainder for the life of his wife, and the first son which he may afterwards have, is warranted only for his own life. M. Mo. 677.

So, by a custom allowing a grant for life, it may be granted *durante viduitate*. R. 4 Co. 30. Down. Cro. El. 323.

So, by a custom which allows a grant to three, *successive sicut nominantur*, a grant may be to A. for three lives. R. Mod. Ca. 67. 1 Sal. 188.

If the grant be for the lives of him and his two brothers, his son shall have it.

And if he dies without issue, his executor, or administrator, and not the other lives. 1 Ver. 415.

If a grant be for three lives *successive sicut nominantur*, by custom the wife of the grantee may have free bench, whereby the estate is continued during the life of the wife. 1 Lev. 21.

If the lord makes a lease for forty years, from the death, surrender, or other determination of the estate, and the three lives all die; the lease does not commence till the death of the wife: for it shall be such a death as determines the estate. Per two J. 1 Lev. 21.

So, a custom allowing a grant for life, &c. warrants a grant for years. 4 Co. 23. Co. L. 52. b.

[*](C 11.) In remainder.

So, by custom, a copyhold may be granted in remainder. Adm. 1 Sand. 151. R. 4 Leo. 9.

And if a custom allows a grant in fee, it warrants a grant in tail, for life, or years, remainder to another and his heirs. Co. L. 52. b. Poph. 35.

So, a surrender may be to A. in fee, and if he dies within age, and unmarried, to B. in fee; the remainder to B. is good. Semb. 2 Rol. 791. l. 40.

So, he in remainder may be admitted to it by himself. Lut. 758.

(x) Common recoveries may be suffered in copyhold courts by attorney. 47 G. 3. st. 2. c. 8.

But a grant in remainder may be restrained to the assent of the tenants. Dub. 3 Leo. 226.

(C 12.) Reversion.

So, a reversion of a copyhold estate may be granted, but not without a special custom. D. Mar. 6. Vide post, (F 6.) R. 3 Leo. 239.

So, a man admitted to a reversion may surrender to another.

Or, a moiety or two parts, &c. Ray. 18.

So, if a lease be of a copyhold by licence rendering rent, the copyholder may surrender by name of a reversion. Vide post, (F 6.)

And there needs no attornment; for the admittance is tantamount to an inrolment, and supplies it. Per two J. 1 Leo. 297. R. Hob, 177, R. Ray. 18.

(D 1.) DESCENT OF A COPYHOLD.

Though a copyholder holds at the will of the lord, yet, by custom, his estate is descendible to his heir. R. 3 Co. 21. Brown.

And the descent shall be regulated by the rules of the common law, as incident to an estate descendible. R. 4 Co. 22. a.

[A copyholder, heir to her mother, before admission devises to A., and dies without admission or surrender, the lands shall descend to her heir on the part of her mother. Str. 487.

And therefore, if a copyholder, having a son and a daughter by one venter, and a son by another venter, makes a lease for years and dies, and afterwards the eldest son dies before admittance; the daughter shall have it, not the son. R. 4 Co. 21 Brown. Dy. 291. b.

If there be a copyholder for years, remainder to A. and his heirs; A. dies during the years; his sister of the whole blood shall take, for the possession of the termor was his possession. R. 1 Vent. 261. 1 Mod. 120.

So, if a copyholder dies, and the guardian of the heir be admitted; his possession is sufficient to cause the sister of the whole blood to inherit. Dy. 292. a. 1 Rol. 502. l. 50. Dal. 110.

So, if the heir dies before admittance, or guardian assigned; if the homage find him to be heir, it is sufficient to cause his sister to inherit. R. Mo. 125.

Otherwise, if, by custom, the lord may demise to a stranger during the minority of the heir; the possession of the stranger does not cause the sister to inherit. D. Dal. 110.

[*]So, if the heir of a copyholder dies before admittance, the descent shall be to the heir of the whole blood. R. Dy. 291. b. Mo. 125.

So, if a copyholder dies, his wife *privement enseint* with a son, and his daughter, as heir, is admitted, and afterwards the son is born; he shall have it, and enter upon the daughter.

So, if a copyhold be limited in remainder, it ought to vest during, or at the end of the particular estate. 1 Rol. 238. 438.

And if the remainder be contingent, it shall be in abeyance till the contingency happens. R. 417. l. 45.

But a surrender by a copyholder for life, before the contingency, does not defeat it. Semb. 2 Rol. 794. l. 45. Vide post, (F 14.)

But, by special custom, a descent may be contrary to the rules of the common law. Vide post, (K 4.)

[But the custom shall be interpreted strictly; thus where there is a cus-
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tom within a manor that lands shall descend to the eldest sister, where there is neither a son nor a daughter, this shall not extend to an eldest niece; but in default of such son, daughter and sister, the lands must descend according to the rules of the common law. 1 Term. Rep. 466.]

(D 2.) What an heir may do before admittance.

And the heir, upon a descent, may enter and take the profits, before admittance. R. 4 Co. 22. b. Brown. 4 Co. 23. b. Clerk. Dy. 291. b. (y)

And shall have trespass. 4 Co. 23. b. Clerk. R. Noy. 172.

And may make leases. R. Mo. 596.

And the lessee may maintain an ejectment, before the admittance of his lessor. R. 1 Leo. 100.

So, he may surrender to the use of another, before admittance; but the lord shall not lose his fine. R. 4 Co. 22. b.

So, he may surrender a reversion descended to him, before admittance. R. 1 Rol. 499. l. 25. Cro. El. 662. R. 2 Cro. 36.

So, if the heir dies before admittance, his heir shall enter and take the profits, and shall have trespass before his admission. R. 4 Co. 23. b. Clerk.

If a surrender be to A. for life, remainder to his eldest son in fee, and A. dies; his heir shall enter before admission, though he claims by purchase. Per Hale, 1 Mod. 120.

So, the lord may avow for his rent, before admittance. Kit. 87. b.

But he shall not be sworn upon the homage, before admittance. Ibid. (z)

(E) WHAT COLLATERAL QUALITIES A COPYHOLD SHALL HAVE.

But a copyhold shall not have the collateral qualities of other inheritances, which do not concern the descent, without special custom: [*]as, a husband shall not be tenant by the curtesy of a copyhold, without special custom. R. 4 Co. 22. a. Brown. R. 4 Co. 22. b. Rivet. R. Cro. El. 361. 1 And. 192.

But by special custom, he shall be tenant by the curtesy. Vide post, (K 1.)

A wife shall not be endowed. 4 Co. 21. Brown. R. 4 Co. 30. b. Shaw. Mo. 410. Cro. El. 426.

But by special custom she shall. Vide post, (K 2.)

So a descent of a copyhold does not toll entry. 4 Co. 22. Brown. R. 4 Co. 23. Gravenor. R. 2 Cro. 36. Poph. 35.

So, if upon a descent the lord admits a stranger before the heir, it is no disseisin. R. 3 Leo. 210.

So there shall be no occupant of a copyhold, but it goes to the lord. Noy, 47. Vide post, (F 14.)

So a copyhold shall not be assets in the hands of the heir to charge him upon a bond of his ancestor. 4 Co. 22.

So a surrender of a copyhold with warranty, the warranty is void. Mo. 352.

So a surrender by a copyholder seised in tail does not make a discontin-

(y) An heir has a complete title against all the world, except the lord, before admittance. 2 T. R. 198.

(z) The heir cannot devise before admittance. Str. 487.

uance; for there is no livery nor warranty. 4 Co. 23. cont. R. Cro. El. 383. 717. Cont. per Walmsly, 2 Cro. 105. Acc. Mo. 358. R. Acc. Mo. 753. R. acc. Cro. El. 148.

So a surrender by a husband, seised in right of his wife, does not make a discontinuance. R. 4 Co. 23. Bullock. R. Mo. 596.

A surrender by an infant does not put his heir to a *dum fuit infra ætatem*. R. 1 Leo. 95.

So a surrender in fee by a copyholder for life is no forfeiture. Vide post, (M 2.)

So a surrender by a copyholder for life, and him in remainder in fee, being an infant, does not bar, nor put the heir of the infant to a *dum fuit infra ætatem*. Per two J. Cro. El. 90.

So the lord cannot grant the custody of customary lands to a committee, if his copyholder is a lunatic, without special custom. Per Hob. 215. Hunt. 16. Vide post, (K 5.)

Nor the guardianship of his copyholder, if he be an infant. R. Lut. 1190. Vide post, (K 5.)

But if a copyholder dies, his heir within the age of fourteen years, his *prochein amy* shall be a guardian to him, if there is no special custom in the manor for it. R. 2 Rol. 40. P.

So, if tenant for life, remainder to the first and other sons in tail, remainder to B. in fee, purchases the fee, and B. surrenders; the contingent remainder to the first and other sons is not destroyed, for the freehold in the lord supports it. R. 2 Ver. 243.

So a copyholder cannot take housebote, hedgebote, cartbote, &c. as a freeholder for life or years, without special custom. R. Cro. El. 5. Cont. Cro. El. 361. 1 Brow. 132. Vide post, (K 7.)

[*](F) SURRENDER OF A COPYHOLD.

(F 1.) In court.

If a copyholder will alien his land to another, he ought, according to custom, to make a surrender to his use. Lit. s. 74.

And every copyholder may surrender in court, without alleging in pleading any special custom for it. Co. L. 59. a. 9 Co. 75. b.

(F 2.) Out of court.—To the lord.

So a copyholder may surrender to the lord himself, out of court, without alleging a special custom for it. Co. L. 59. a.

So out of the manor. Adm. 1 Sal. 184.

(F 3.) To the steward.

So he may surrender out of court to the steward. R. 4 Co. 30. b. 1 Sal. 184. (Vide 2 Cro. 526.)

Though it be to the use of the steward. R. Cro. El. 717.

Though the steward be retained only by parol. R. 4 Co. 30. b. 1 Leo. 228. R. 2 Cro. 526.

So a steward out of court may examine a feme covert, without a special custom for it. R. 2 Cro. 526.

And may depute another to take the surrender. 1 Sal. 95.

And a surrender to such a deputy in Ireland, &c. is good.

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So a surrender may be to the steward out of the manor. Semb. 1 Sal. 184. (a)

So a surrender to A. deputed by a deputy of the steward, is good. R. 1 Sal. 95.

But a surrender cannot be to a steward out of the manor, if he be by parol. R. Godb. 142.

(F 4.) To tenants, &c.

So by special custom he may surrender to two tenants of the manor. Co. L. 59. a. Lit. s. 79.

But he ought in pleading to allege a special custom for it. Co. L. 59. a. Or to the reeve or bailiff, &c. Co. L. 59. a. Lit. s. 79.

Or to the bailiff in the presence of two tenants, *hoc testifican'*. Kit. 102. b.

Or to one tenant. Ibid.

Or to one tenant in the presence of others. Ibid.

And if a copyholder covenants to make a surrender; if he surrenders to two tenants, it is sufficient. R. 1 Lev. 293. 1 Mod. 61.

The heir may surrender a reversion to two tenants, before admittance. 1 Rol. 499. l. 45.

So, if he alleges a surrender to two tenants *secundum consuetudinem*; it is sufficient upon covenant to surrender, without alleging a custom for it. R. 1 Mod. 61.

[*] But husband and wife cannot surrender to two tenants; for they cannot take an examination of the wife without special custom. R. Cro. El. 717.

And a custom, that tenants who take a surrender, if they do not present it at the next court, forfeit their copyholds, is good. Adm. per Holt, 3 Ann. int' Stint and Blount.

But an action upon the case does not lie against tenants for refusing to take a surrender. 1 Rol. 108. l. 40.

(F 5.) By attorney.

A copyholder may surrender in court by attorney, without a special custom to warrant it; for he may surrender by the general custom of England, which is the common law, and then it is incident to do it by attorney. R. 9 Co. 75. b. 1 Rol. 500. l. 50. Per Wray, two J. cont. 1 Leo. 36.

[But a custom, that a surrender must be made in person, unless in special case of disability, is not contrary to law. 2 Vezey sen. 679.]

[A purchaser of a copyhold is not obliged to accept of a surrender by attorney, but may insist on the vendor's surrendering in person in court. Ibid.]

But he cannot surrender into the hands of two tenants, by attorney; for such surrender, though in person, it is not warranted, without special custom. R. 9 Co. 76. a. b. 1 Rol. 501. l. 5.

And if he covenants to surrender on request, the refusing to execute a letter of attorney to make a surrender is no breach. R. Cro. Car. 299.

An attorney who makes a surrender, ought to make it in the usual form; as, by the rod, &c. according to the custom of the manor. R. 9 Co. 76. b. 1 Rol. 501. l. 10.

And he ought to make it in the name of the copyholder, not in his own name. 9 Co. 76. b.

(a) And a custom, that he shall not take surrenders out of the manor, is void. Ld. Rd. 76. Vol. III. 21 [*167]

Or shew his authority, and say, that he surrenders by force of such authority. R. 9 Co. 77. a. 1 Rol. 501. l. 15.

But a deputy may act in his own name, as well as the name of his principal. R. 1 Sal. 96.

And therefore a surrender to him who is deputed by the steward, without taking notice of his authority, is good. Ibid.

(F 6.) By what words.

A surrender in general words (*in manus domini*) is sufficient without limiting any estate; for the lord is but an instrument, for the admission of the *cestuy que use*. Co. L. 59. b. 4 Co. 29. Bunting. Vide ante, (C 6.)

So, he who has a fee, may surrender to another in fee, or for a less estate, as in tail, or for life, without special custom. Per two J. Godb. 20.

So, if a man has made a surrender to A. for life, he may afterwards surrender the reversion, or remainder of the copyhold, if he be not restrained by the custom. R. 4 Leo. 9. Adm. 1 Sand. 151. Vide ante, (C 11, 12.)

And if he has made a lease by licence, he may afterwards surrender [*]his copyhold by name of the reversion. R. 2 Rol. 45. l. 5. Semb. 3 Bul. 81. R. Hob. 177.

But it ought to be an actual surrender; for if a man comes into court, and renounces his copyhold, it does not amount to a surrender. R. 1 Rol. 502. l. 5.

Or, if he takes a new copy for his life; this is not a surrender of his first estate (at least but for his life); for a copyhold shall not be extinct by a surrender in law. R. 1 Rol. 501. l. 50. 3 Bul. 81. and there semb. that was a surrender to the use of himself for life.

So, if a copyholder joins with the lord in a fine *sur conusance de droit* to A., it does not amount to a surrender, for the customary interest does not pass by the fine; and therefore a second life, where, by the custom, a surrender of the first life bars him, is not barred by the fine. R. Ray. 503. 2 Jon. 153. Pol. 564.

But if the lord pretends a forfeiture, and the copyholder agrees afterwards with the lord to accept a grant of part for his life, that amounts to a surrender. R. 1 Leo. 191.

So, if a copyholder in court prays the lord to accept. Per Hob. Hut. 65.

So, a surrender to the use of A., *habendum* to him and his wife, is void to the wife, she being named only after the *habendum*. Semb. 2 Rol. 67. l. 52.

Yet, if the surrender was general, without mention of any use, and the surrenderor takes a new copy, which says, *quod ipse cepit extra manus domini cui dominus concessit habendum* to him and his wife; it is good to the wife, for it was granted to nobody before the *habendum*, and upon such a general surrender and acceptance of a new grant, the surrender shall be intended to both. R. 2 Rol. 67. l. 25. 2 Cro. 434. Poph. 125. (b)

So, a surrender to commence after the death of the surrenderor, is void. R. 4 Leo. 8. 2 Rol. 61. C. 2 Cro. 376. R. Godb. 451.

So a surrender to an infant in fee, and if he dies before twenty-one, to

(b) Under a grant of a reversionary estate to A., who had before a life-estate in the premises, *habendum to him for the lives of B. and C., during the life of either of them longest living successively* according to the custom; A. takes the legal estate in reversion, and not the *cestuy qui vie's*, although such was the evident intention of the grantee, and although they were admitted tenants in reversion. 3 East, 260.

B. If the contingency does not happen in the life of the surrenderor, though it happens afterwards, the estate to B. is void. R. 2 Rol. 794. l. 50.

Yet, a surrender in writing to A., and at the end a memorandum, that the surrender shall not be of effect till the death of the surrenderor; the memorandum is void, and the surrender being complete before, shall be good. R. 2 Rol. 61. C.

So, a surrender to A. if an infant *in ventre sa mere*, dies within age, is void. R. 2 Cro. 376. 2 Bul. 272. For a surrender cannot take effect upon a contingency. 1 Rol. 109. 137. 253. Godb. 264.

So, a surrender to an infant *in ventre sa mere* is void; because it commences at a future day. Semb. 1 Rol. 253.

But a surrender to A. for life, and afterwards to an infant *in ventre sa mere*, is good, if the infant is born in the life of A. Semb. 1 Rol. 254. 2 Rol. 415. l. 55.

[*]So, a surrender to commence at a future day is void. Semb. 1 Rol. 137. 253. Godb. 265.

So, a surrender does not pass the fee without the word, heirs: as if a surrender be to A. and his son, and for want of issue of the body of the son, remainder to B. The son has it only for life. 1 Rol. 839. l. 50.

[Because a surrender is considered as a common law conveyance, and is not entitled to the same favourable construction as a will. 3 T. R. 473.]

[In order to effectuate the intention of the parties, the court will construe the word "or" to mean "and," as well in a surrender of copyhold premises, as in a will. Ibid.]

(F 7.) By what persons.

So, a surrender by him who has no ability; as, by an infant, is void; and he may enter at full age, though the grantee was admitted. R. Mo. 597. R. 1 Leo. 95.

So, a surrender by the husband, of a copyhold of him and his wife, is void as against the wife. Adm. 4 Leo. 88. Vide ante, (E.)

So, a surrender by a surrenderee, before admittance, is void. Vide post, (G 1.)

So, if a devise be to A. upon condition that he pay 100*l.* to B., and if not, then to B.: A. does not pay; B. cannot surrender, before admittance and actual entry. Per Holt, at the Assizes, 13 W. 3. int' Clerk and How. (Vide 1 Ld. Ray. 726.)

So, a surrender by a disseisor is void; as, if he in reversion enters upon tenant for life. R. 2 Mod. 32. (c)

[So, if the heir apparent of a copyholder in fee, surrender in the lifetime of his ancestor, and survive him, the heir of such surrenderor is not estopped by that surrender of his ancestor, from claiming against the surrenderee. 3 T. R. 365.]

But a surrender by husband and wife, (the wife being examined by the steward according to the custom,) binds the wife. Adm. Lit. 274. Vide Baron and Feme, (G 4.)

[Whether feme-covert can surrender without her husband's joining, though in his presence. Dub. 1 Vezey sen. 229.]

[But by custom such a surrender would be good. Moor, 123.]

(c) A party not in the seisin cannot surrender. 11 East, 185.

[Yet a custom that a feme-covert may surrender her copyhold without the assent of her husband, is void. 2 Wils. 1, 2.]

[But without any special custom, a feme-covert, separated from her husband under covenants that she shall enjoy to her own use, and dispose as she thinks proper, what property shall descend to her, may surrender copyhold lands descended to her after the separation, without her husband. 1 H. Bl. 334. 2 Brown. 377.]

And if a husband grants a copyhold of his wife to the lord, who grants it to a stranger, and the wife after the death of her husband recovers, and grants it to the lord; he shall not have it against his own grant to the stranger. Per Wray, 4 Lco. 88.

[*](F 8.) To what use.

The surrenderor ought to declare, upon a limitation of the uses, what estate the surrenderee shall have; for if he surrenders to the use of A. generally, A. takes but for life. Co. L. 59. b. R. 4 Co. 29. Bunting.

[If the uses are indorsed on the back of the surrender, and signed by the steward, it is sufficient, though they are not specified in the rolls. 3 Atkins, 73.] (d)

If he surrenders without limiting any use at all, the lord shall have it. Kit. 81. b. But the lord shall have it to the use of the surrenderor. Semb. 1 Rol. 253.

Yet if a surrender be without any use expressed, and at the next court the surrenderor and his wife are admitted, it shall be intended that the surrender was to their use. R. Poph. 125. Vide ante, (F 6.)

So, by custom, it may be, that upon a surrender to another, without limiting any estate, the lord shall admit him in fee. R. 1 Rol. 48.

Or, upon surrender to another for money, without limiting any estate. R. 1 Rol. 48.

By special custom, a surrender *sibi & suis* may create an estate of inheritance. R. 4 Co. 29. b. Bunting.

Or, *sibi & assignatis*. 4 Co. 29. b.

Or, *sibi & suis in villenagio*. Kit. 102. b

So, by custom, a surrender to three *successive*, gives an estate to them, one after the other. Kit. 103. b.

So, a husband may surrender to the use of his wife; for though she takes by the surrenderor, yet it is *mediante domino*. R. 4 Co. 29. b. Bunting. Adm. 1 Rol. 317.

So, he may surrender to the use of his wife, remainder to himself. D. 1 Rol. 317.

So, to the use of A. and his wife for life, with a contingent remainder to

(d) 1. A will sufficient to pass personalty, and not executed according to the statute of frauds, is sufficient to declare the use of a copyhold estate. 2 Blk. 1114.—2. If copyhold premises are surrendered to such uses as the owner shall appoint, the appointment may be made by will; nor is a surrender to the use of the will necessary. 3 M. & S. 158.—3. Whether a surrender of copyhold premises be voluntary, or for a valuable consideration, the legal effect is the same. Therefore, the rule of construction touching the uses to which it has been made, is the same in both. 3 T. R. 470.—4. If a copyholder in fee surrenders to the use of himself and his assigns, for life, with remainder to such uses as he should appoint, and afterwards, without appointing, surrenders to a purchaser in fee, the legal estate in fee, is vested in the purchaser. 7 T. R. 103.—5. A dormant surrender of a copyhold, (that is, a surrender to A. on condition to perform the will of the surrenderor), will vest an estate in the dormant surrenderee, sufficient to support the contingent remainders of the surrenderor's will, without the interposition of trustees for the purpose. 2 Cox, 136.—6. A dormant surrender operates as a severance of a joint-tenancy, though it is revocable during the lifetime of the surrenderor. 2 Cox, 136.

the right heirs of the body of himself and his wife. R. 1 Rol. 238. 317. 438.

So, by custom, a feme-covert may surrender to the use of her will, and devise to her husband. R. 2 Brown. 218.

So, a man may surrender to such use as the lord shall name. R. Lit. 26.

[*]So, he may surrender to A. in trust for B. Adm. All. 14.

And the trust shall be executed in Chancery. All. 15.

But if B. is an alien, the king shall have the trust. Semb. All. 15.

Yet the king cannot seize it without a decree. Semb. All. 16.

(F 9.) To the use of a will.

A copyhold does not pass by devise, without a surrender, but it ought to be surrendered to the use of the last will and testament. 4 Co. 24. b. 3 T. R. 169.

And therefore, if the lord grants the inheritance of a copyhold, the copyholder cannot devise; for the grantee cannot take a surrender. R. 4 Co. 24. b. Murrel. (e)

But a devisee takes by the surrender, not by the will, which is only declaratory of the uses. R. 1 Bul. 200. R. 2 Cro. 199. D. 2 Rol. 383.

And therefore, if there be joint-tenants of a copyhold, and one surrenders to the use of his will, and devises to A. in fee, and dies; A. takes, for by the surrender the jointure was severed. Co. L. 59. b. 2 Rol. 383.

If a copyholder surrenders to the use of his will, and devises to A. for life, and that he shall name two, who shall sell; A. has not a fee, but only an authority to name two venders, and the vendee shall be in by the will, without a new surrender. R. 2 Cro. 199.

If he surrenders to the use of a will, which he shall leave with A., it is good as to his will, though it is not left with A., if he dies before the devisor. R. Lit. 26.

So, though A. does not die in the life of the devisor. Dub. Lit. 26.

[But a copyhold surrendered to the use of a will, does not vest in the appointee dying in the life of the testator. 2 Vezey, 77.]

[Nor will a surrender to such uses as he shall appoint, give effect to a will made before. Ambler, 299.]

So, a custom that a feme-covert may surrender to the use of her will, and by her testament devise, is good, though she devises to her husband. R. 2 Brow. 218. 3 Leo. 81. Vide Godb. 14. 143. (f)

When a copyholder surrenders to the use of his will, it remains in the copyholder, and not in the lord. R. 4 Co. 23. Cro. El. 442. 349.

And if the copyholder does not afterwards make his will, but surrenders to A. and his heirs, the surrender to A. is good. R. Cro. El. 442.

So, if he does not make a will, nor a last surrender, the copyhold descends to his heir. Cro. El. 442. [Dick. 416.]

So, if he makes a will, and devises for life or in tail, all the estate not devised descends to the heir. R. Cro. El. 148. 1 Leo. 174.

[*]But if a copyholder by will devises to his wife for life, and that she

(e) 1. So the surrenderor of a copyhold in mortgage, cannot devise the equity of redemption, (which remains in him until admittance), without surrendering to the use of his will. 5 East, 132. 1 Smith, 363.—2. But copyholder in fee, having surrendered to the use of his will, and afterwards surrendering to new particular uses, with reversion to himself in fee, is of the old use, and may devise the reversion, without any admittance or fresh surrender to the use of his will. 2 Blk. 1046.

(f) But a custom, that copyholds shall not be surrendered to the use of a will, is bad. 3 B. C. C. 286.

shall sell the reversion, and afterwards surrenders to his wife for life, according to his will: she may sell. R. Cro. El. 68.

If he devises part of his copyhold to his wife, and afterwards surrenders the whole to the use of his will; this does not enlarge the devise. R. 3 Leo. 18.

A custom that a testament shall be presented to the next court, otherwise, that it shall be void, is good.

So that it shall be presented within a year and a day. R. Cart. 72. 86.

And upon such custom, if the testament is not presented by the devisee for life, it is void as to him in remainder. Semb. Cart. 73. 86.

Though devisee be an infant. Semb. Cart. 86.

[A copyhold surrendered to the use of a will passes by the general words, All my real estate. 2 Ves. 164.]

[But otherwise where there is no surrender, unless testator has but one copyhold and no freehold, and then only in favour of wife, children, and creditors. Id. *ibid.*] (g)

(F 10.) Presentment of a surrender.

By surrender the copyhold estate passes to the lord, (being made out of court,) upon a tacit condition, that it be presented at the next court, according to the custom of the manor. Co. L. 62. a.

And if it be not presented at the next court, it is void. Ibid.

[By special custom it may be presented at any subsequent court. 2 Vezey, 596.]

And it may be presented at the next court, though the surrenderor dies before. R. 4 Co. 29. b. Bunting. 1 Rol. 501. l. 30. Co. L. 62. a.

So a surrender to two tenants, &c. may be presented at the next court, though the tenants die before, it being proved that there was such a surrender. 4 Co. 29. b. Bunting. R. 3 Bul. 216. 2 Cro. 403. 1 Rol. 501. l. 30.

Unless the presentment after the tenant's death be restrained by special custom. D. 3 Bul. 218.

The whole surrender ought to be presented; for if it was upon condition, and the condition is omitted, the whole presentment is void. R. 4 Co. 25. Kite.

But by special custom, that the surrender be presented within a year, it is sufficient, if it is presented within the year, though it be not at the next court. Adm. 3 Bul. 215.

Or that it be presented at the next court, or within a year, or at the next court after the year. Semb. 5 Co. 84. Cro. El. 668.

So a custom, that the presentment be, of a surrender to the use of a will, at the next court after the death of the surrenderor, is good; though it be not at the next after the surrender made. Adm. per Holt, at the Assizes, 3 Ann. inter Stint and Blount. (Vide Godb. 143.)

[*]So the presentment of a surrender to the use of a will, at the next court after the death of the surrenderor, though it be not the next after the surrender made, is good, without a special custom. Semb. by the general ex-

(g) But now by st. 55 Geo. 3. c. 192. the necessity of a surrender is dispensed with, upon payment, by the persons entitled or claiming, of all duties, fees, &c. that would have been due and payable in case a surrender had been made. It seems, however, to be most advisable to surrender to the use of the will in every case where it can be done, notwithstanding the benefit of the act. Scr. Cop. 129.

pressions of Co. L. 59. b. 1 Rol. 501. l. 35. Per Wiseman, 28 El. Per Lechmere, at the assizes, 4 Jul. 4 W. & M. inter Carpender and Ilton, at Chelmsford. Dub. per Holt, at the Assizes, 3 Ann. inter Stint and Blount.

So a surrender upon valuable consideration, if it be not presented, shall be aided against a voluntary disposition to another. R. Ca. Ch. 171.

So an agreement to sell or mortgage for money, though there be no surrender. Ibid.

(F 11.) In whom the estate is till presentment.

After a surrender, the estate remains in the surrenderor till presentment. R. Cro. El. 349. R. 2 Cro. 403. 3 Bul. 218. R. Cro. Car. 283. 1 Rol. 502. l. 25.

And till admittance. D. Cro. El. 349. R. Cro. Car. 283. Adm. 3 Lev. 385.

For nothing passes till presentment or admittance. 2 Cro. 403. 3 Bul. 238.

And if the surrenderor dies before admittance, it descends to his heir. R. Cro. El. 349. R. 2 Cro. 403. 3 Bul. 217. R. Cro. Car. 283. D. 1 Vent. 261.

And the surrenderor, before presentment of the first surrender, may again surrender to another. R. Cro. Car. 283. 1 Rol. 500. l. 5. Jon. 306.

And if he surrenders to A. and his heirs, and before presentment again surrenders to A. for life, and at the next court both surrenders are presented, and A. is admitted upon the second, he shall have it only for life. R. 1 Rol. 499. l. 55. Lane, 99.

So if a copyholder surrenders to A. for life, and afterwards to the use of his will; the fee remains in the surrenderor, and not in the lord. R. 4 Co. 23. a. Fitch. Cro. El. 442. 349.

And the surrenderor may afterwards surrender to another in fee. 4 Co. 23. a. Cro. El. 442.

(F 12.) When a surrender may be revoked.

So a surrenderor may revoke a surrender made without valuable consideration, before presentment. Kit. 82. Dub. per Holt, 3 Ann. inter Stint and Blount.

So after presentment, before admittance. Kit. 82.

And the revocation may be by parol.

[So a surrender made by a woman when sole, to the use of her will, is revoked, or at least suspended by another marriage. Ambler, 628.]

(F 13.) When not.

But a surrender upon valuable consideration cannot be revoked. Kit. 82.

So if a copyholder makes a surrender to A. and afterwards to B., and both are presented at the next court; A. shall be admitted. R. Cro. Car. 283. 1 Rol. 500. l. 10.

[*]So if B. was admitted upon the second surrender, and then the former surrender to A. is presented at the next court, and A. is admitted; he shall avoid the admittance of B. Semb. Cro. Car. 284. cited so per Pollexfen, Pol. 50.

So if a surrender be for a mortgage, and before presentment, the surrenderor becomes bankrupt; it shall be preferred to the assignee of the bankrupt. Sal. 449. (Vide 2 Ver. 564.)

Though the surrender never was presented, it shall be preferred in equity, for it is a lien upon the land. R. per Cowper, Sal. 449. [1 P. W. 280.]

And if the surrender is presented at the next court, though there be no admittance upon it, the land is bound, so that all mesne acts shall be avoided. R. Cro. Car. 284.

As if a copyholder, where by custom the wife shall have free-bench, surrenders to A., and the surrender is presented, and then he dies, and A. is afterwards admitted; he shall avoid the free-bench, for his admittance has relation to the surrender. R. 3 Lev. 385.

(F 14.) How a surrender operates. (h)

[The same construction of words must take place as in other law conveyances; and the intent of the party is not sufficient, as in a will. 1 P. W. 16. 2 Atkyns, 101. 3 Atkyns, 11. 3 T. R. 473.]

[Therefore where a copyhold was surrendered to the use of baron and feme for their lives, *et hæredum et assignatorum* of the said baron and feme, and for default of such issue, to the right heirs of A., this was held to be an estate in fee, and not an entail in the baron and feme. 1 P. W. 71.]

[A. seised in fee, surrenders to the use of B. his future wife, and the heirs of their two bodies; for default, to the right heirs of A. She takes estate for life with contingent remainders to the heirs of their two bodies. 3 Wils. 125. 144.]

[Surrender is the conveyance of the ownership of the estate: admission only form, and relates back to the surrender. 4 B. M. 1952.]

Nothing passes by a surrender, but what is sufficient to supply the use limited; and when the *cestuy que use* is admitted, he shall be in by the surrenderor, not by the lord. Co. L. 59. b.

And therefore, if a copyholder surrenders for life, or in tail, the fee remains in him. D. Cro. El. 442.

And if a copyholder surrenders to A. for life, nothing passes but what is sufficient to supply the estate for life; and when A. dies, the reversioner shall have the reversion without any fine for re-admittance. Per Ch. J. 9 Co. 107. a. M. Podger. 1 Rol. 504. l. 8. R. Cro. Car. 205. Per Wray, 1 Leo. 175.

But if a husband seised in right of his wife for life, with remainder over, surrenders to A. for life, who dies in the life of the husband; the lord shall have it for the life of the husband; for he has surrendered his whole estate, and cannot have it again against his own grant, [*] and the remainder he cannot have without a grant to him. Dy. 264. a. 1 Rol. 504. l. 15.

So, if any copyholder only for life surrenders to A. generally, who dies after admittance; the lord shall have it during the life of his copyholder. R. 1 Rol. 504. l. 20. Cro. Car. 204. Jon. 229. 1 Sal. 188, 189. Mod. Ca. 68.

So, if a copyholder for life, with remainder over in fee, surrenders to A. Cont. per North, 1 Mod. 200. Acc. 2 Rol. 794. l. 35.

And if the remainder be contingent, a surrender by a copyholder for life to another in fee, does not defeat the remainder. Sembl. 2 Rol. 794. l. 45. Vide ante, (D 1.)

(h) 1. The surrender of a copyhold, whether to the use of a will or otherwise, only operates upon the estate which the surrenderor had therein at the time, not upon one acquired afterwards. 6 T. R. 63. 12 Ves. 426.—2. Nor a surrender operate by way of estoppel; it can only pass what the party then had. 11 East, 185.

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When a man surrenders to the use of his will, he has the whole copyhold and interest in himself. *Vide ante*, (F 9.)

And therefore, if a copyholder surrenders to the use of himself for life, and afterwards to his son for life, and afterwards to the use of his will, and does not make a will, but afterwards surrenders to A. and his heirs; the surrender to A. is good. *R. Cro. El. 442.*

So if he makes a will, and devises to A. for life, and afterwards to B. in tail, and says nothing of the fee; it descends to the heir. *R. Cro. El. 148.*

So if a copyholder surrenders to such use as the lord shall name, who limits it to A. for life; the fee results to the copyholder. *R. Lit. 26.*

If a copyholder in reversion, or remainder, expectant upon an estate for life, surrenders to him, who has it for life, for his life, and afterwards to himself and his wife in fee; this operates to them by way of a present estate, and not as a remainder. *R. 1 Sand. 151. 1 Sid. 360.*

If a copyholder surrenders to himself for life, and afterwards to A. in tail, and afterwards to his own right heirs; his heir takes the fee by descent. *1 Leo. 101, 102.*

But if he surrenders to A. for life, and afterwards to his own right heirs; his heir takes by purchase. *R. 1 Leo. 102.*

If a surrender be to A. for life, and afterwards to the heirs of the body of A. by her husband begotten; it is a tail executed in A. *Per Coke. 1 Rol. 239.*

If it be to the wife for life, and afterwards to the right heirs of the husband and wife, and the husband enters; he shall be seised of a moiety in right of his wife in fee; for the remainder will be executed for a moiety. *R. 3 Leo. 4.*

[If A. surrenders copyhold to his brother B. till C., son of D., brother to A., attains twenty-one, and after such age to C., his heirs and assigns; and an agreement is indorsed, that B. is to receive the rents till C. attains twenty-one, and then to account to him for the same, but not before; and A. dies without issue, C. dies an infant without issue, or brother or sister born at his death, and B. is heir at law to A. and C., and dies; the heir at law of B. shall take the premises, and shall not account for the profits. *3 Atkyns, 11.*]

[*](G) ADMITTANCE.

(G 1.) What may be done before admittance.

The heir may take the profits, have trespass, surrender, &c. before admittance. *Vide ante*, (D 2.)

The assignee of a copyhold, upon the statute of bankrupts, has an estate in him before admittance. *R. Cro. Car. 569. Jon. 451, 2.*

And he shall avoid all mesne acts, between the assignment and admittance, for when he is admitted, it has relation to the bargain and sale; and therefore if the bankrupt afterwards dies, and his wife is admitted, the assignee after admittance shall avoid it. *R. Cro. Car. 569.*

But by the st. 13 El. 7. s. 3. assignee of a copyhold shall not enter or take the profits, till he hath agreed with the lord for his fine, who at the next court shall admit him tenant.

If by custom the wife has free-bench, she shall enter and lease for a year, before admittance. *Hob. 181. R. 1 Rol. 502. l. 10.*

So, if the lord refuses admittance, the copyholder shall have all actions, as if he was admitted. Per two J. Hob. 181.

But a surrenderee cannot enter and take the profits, before admittance. R. Cro. El. 349.

Nor after presentment of a surrender to him. Per two J. Poph. 128.

Nor have an action. Cro. El. 349.

Nor make a surrender. R. Yel. 145. Per two J. Poph. 128. R. 1 Brow. 143.

Nor shall he be sworn on the homage. Kit. 87. b.

Though a surrender be by a copyholder to his youngest son, he can do nothing before admittance. R. Lane, 20. (i)

So, where there is a custom of borough-english, if the father surrenders to him and his heirs and dies, and the youngest son enters; the eldest son cannot enter before admittance. R. 1 Rol. 502. l. 20.

So, where by custom a copyholder for life shall name his successor, the nominee cannot enter before admittance. Per Coke, 2 Bul. 338.

So, by custom, the surrenderee shall not be admitted till proclamation that the next of blood, or he who has land adjoining eastward, comes, and he pays all that the surrenderee swears he ought to pay with his costs, he shall be admitted, and not the surrenderee. Kit. 102. b.

Yet if the steward refuses to admit a surrenderee, he may enter and plead in defence of his title to the ejectment by the lord, without admittance; for the lord is party to the wrong. Semb. per four J. Yel. 16. R. Hob. 181.

(G 2.) When necessary.

Every copyholder ought to be admitted tenant to his copyhold. Pl. Com. 529. b.

[*] But till presentment of the death, and proclamation thereupon, the heir need not be admitted. 1 Leo. 100. . 3 Leo. 221.

And if the heir upon proclamation does not come to be admitted, the lord may seize *quousque* he comes, without a special custom. D. 1 Lev. 63.

[If copyhold surrendered to the use of will is devised to six persons, and one offers himself to be admitted, and the lord refuses, he cannot seize *quousque* he should admit him, and then proceed for his whole fine. 2 Wils. 162.]

And by special custom, if he comes not after three proclamations, at three several courts, the lord may seize it as forfeited. Adm. 8 Co. 99.

But not without such custom. R. 1 Lev. 63.

Or if he does not come within a year and a day. Pl. Com. 372. a.

So a custom, that he to whose use a surrender is made shall come to be admitted after three proclamations, otherwise his land shall be forfeited, is good. R. 1 Rol. 568. l. 20. Noy, 42. Adm. 3 Mod. 221.

Yet the proclamation ought to be, that he come to be admitted to such copyhold, specially named; for it is not sufficient that he come to be admitted generally. Dub. 1 Lev. 63.

But a custom to seize as forfeited, for not claiming to be admitted, does not bind the heir, if he was beyond sea, *non compos*, or in prison at the time. R. 8 Co. 100. 2 Cro. 226. Per three J. 2 Cro. 101. R. Godb. 268.

(i) 1. A surrender by a purchaser to the use of a will, before admittance, is a nullity. 11 East, 246.—2. And till admittance of the surrenderee, the legal estate remains in the surrenderor. 5 East, 132. 1 Smith, 363.—3. Who however is considered as a trustee for the surrenderee. 1 T. R. 600.

Or if he was an infant. R. 8 Co. 100. 1 Leo. 100. R. 3 Leo. 221. Per four J. Coke cont. 2 Cro. 226. R. in C. B. and affirmed by three J. in error, 3 Mod. 223. Sho. 31. 1 Sal. 386. Carth. 44.

But he may forfeit *quousque* he be admitted, though an infant. Per Williams, 2 Cro. 226. Per Holt and admitted per Eyre, if there be a special custom for it, but Dolbin cont. 3 Mod. 223. 1 Sal. 386.

And if he be within the realm at the time of the descent, though he goes out before proclamation, he shall forfeit. Adm. 2 Cro. 101. (k)

(G 3.) When not.

If a copyholder surrenders to A. for life, who dies, he shall have it again without re-admittance. Vide ante, (F 14.)

[*]So if a copyholder makes a lease for years by licence, and the lessee dies, his executor needs no admittance. R. Mo. 128.

So if there be a copyholder for years who dies, his executor needs no admittance. R. Mo. 128. D. 1 Leo. 4.

So if husband be admitted with his wife, where by custom he shall be tenant by the curtesy; if the wife dies, the husband need not be re-admitted. 1 Leo. 4.

So, the admittance of tenant for life, is an admission of him in remainder; so that the lord does not lose his fine. 4 Co. 22. b. Brown. R. 4 Co. 23. a. Fitch. Cro. El. 504. 662. Dub. 1 Rol. 505. Y. R. Mo. 358. 465. R. 2 Cro. 31. R. 1 Vent. 260.

So, the admittance of a copyholder for years, is an admittance of him in remainder, after the years. R. 1 Vent. 260. R. 1 Mod. 120.

(G 4.) What shall be an admittance.

Any words, which shew that the lord accepts him for his tenant are sufficient.

So, if the lord, having notice of a surrender, accepts rent of the surrenderee, it is an admittance in law. R. 1 Rol. 505. l. 26.

Though the acceptance be out of court. 1 Rol. 505. l. 27.

But it is necessary that the surrender be presented before the acceptance. R. 2 Cro. 403. 3 Bul. 219.

So, if a surrenderee at another court makes a surrender in court; for the allowance by the lord to make a surrender, amounts to an admittance, Dub, 38 El. R. 41 El. 1 Rol. 505. l. 20. Dub. 3 Bul. 240.

(k) 1. The title to a copyhold where the party claims by descent is, as against all but the lord, complete without admittance. Therefore, a mandamus to the lord to admit such party will be refused. *Secus*, in the case of other copyholders. 2 T. R. 197.—2. And title to a copyhold may be made through the heir, though he never was admitted. 10 East, 583.—3. A copyholder surrenders to the use of his will, and by his will orders and directs two persons to sell, and to apply the monies arising thereby for the purposes in the will. They may sell without being admitted, and the lord shall admit the vendee, and shall have but one fine. 2 Wils. 400.—4. Where the husband of a woman, tenant of a copyhold, is entitled, by the custom, to hold on at her death in the nature of a tenant by the curtesy, her admission is not a necessary ingredient in a case where her title is by the general rule of law complete without admission. 10 East, 583.—5. But the devisee of a copyhold cannot, without admittance, devise the same. 1 Mad. 627. 7 East, 8.—6. A person claiming to be admitted to a copyhold as heir, applies by his attorney to the steward, out of court, stating his claim, and asking whether he would admit him. The steward answers, the lord is absent, and that he could not take upon himself to admit him till he returned. Held, that what was said by the steward was a dispensation of the heir's attendance and claiming at the lord's court, and that he might thereupon bring ejectment. 2 M. & S. 87.

But there ought to be an express acceptance of a certain person, which amounts to an admittance; for if a surrenderee, before his admittance, surrenders to A., who is admitted, it does not amount to an admittance of the surrenderee. R. Yel. 145. 1 Brow. 143.

So, if a surrender be to the use of B., and the steward inrols it, and gives him a copy of it without more, it is no admittance; for it ought to be an act done. R. Bridg. 82. Poph. 127.

[Joint-tenants take *per my et per tout*; and the admittance of one of several joint-tenants supplies the whole tenure to the lord; but it is otherwise in the case of parceners. 3 T. R. 165.]

(G 5.) When it shall be.

The lord may admit before a surrender is presented. R. 1 Rol. 502, l. 30.

But the heir is not bound to be admitted till the death of his ancestor is presented, and proclamation made for his admittance. 4 Leo. 31. (l)

(G 6.) By whom it shall be.

Every lord having possession of a manor by right, or by wrong, may make admittances. Vide ante, (C 3, 4.)

And every steward having colour of authority. Vide ante, (C 5.)

[*](G 7.) In what place.

The lord may make an admittance in court.

Or, at any place out of court, and out of the manor. R. 4 Co. 26. b.

So, the steward may make an admittance out of court, at any place within the manor, as well as in court. 1 Rol. 505. l. 15.

But not out of the manor. R. 4 Co. 26. b.

Unless where, by custom, the court has been held out of the manor. Cro. Car. 367. Vide post, (R 4.)

(G 8.) By attorney.

The lord may admit a copyholder by attorney, as well as in person. R. 9 Co. 76. 1 Rol. 505. l. 510.

But the lord may refuse to admit by attorney; because his tenant ought to do fealty, which he cannot by attorney. 9 Co. 76. 1 Rol. 505. l. 5. (m)

(G 9.) How it shall be made.

An admittance ought to be pursuant to the surrender; for the lord is only an instrument, and the surrenderee, when admitted, is in by the surrenderor. R. 4 Co. 27. b. Taverner. 4 Co. 28. b. Westwick.

And therefore, if a surrender be to A. for life, and he is admitted to him and his heirs; he has it only for life, the reversion being in the surrenderor. R. 4 Co. 29. b. Bunting. R. 1 Rol. 504. l. 2.

If a surrender be to A., and A. and his wife are admitted, it is void to the wife, without a special custom. R. 4 Co. 28. b. Westwick.

(l) It is sufficient if the surrenderee be admitted at any time before trial. East, 208.

(m) Feme coverts and infants may be admitted to copyhold estates by their attorneys or guardians. 9 G. 1. c. 29. s. 1.—Fines of admission thereon, how recoverable. Id. s. 2.

So, if a surrender be to A., and he and a stranger are admitted; it is void to the stranger, and the whole vests in A. 4 Co. 28. b.

So, if a surrender be to A. and B. for life, remainder to the heirs of the body of B. and the surrenderor, and A. and B. are admitted in fee; they have it only for life. R. 1 Rol. 438.

So, if a surrender is absolute, and the admittance upon condition; he has it absolutely. 4 Co. 28. b.

So, if a surrender is of such and such copyholds, and the admittance is to all copyholds of the surrenderor; nothing vests but the particulars mentioned in the surrender. R. Dy. 251. b. 1 Rol. 405. l. 45.

So, if a surrender be to A. and his heirs; and A. dies before admittance; the lord may admit the heir. 1 Rol. 504. l. 40.

So, if a surrender be to A., remainder to B., and A. dies before presentment of the surrender; B. shall be admitted. R. Dy. 251. a. 1 Rol. 504. l. 35.

So, if a surrender be to A. for years, remainder to his right heirs; the admittance of A. will be the admittance of the heir, so that if he dies, such admittance of the heir makes a *possessio fratris*. R. 2 Lev. 107.

[*](G 10.) The lord compellable to admit.

If the lord refuses to admit, he shall be compelled in chancery. R. 2 Cro. 368. Per Dodd, 2 Rol. 274. [Cary, 3.] (n)

So, if a surrender be to the lord, who is *dominus pro tempore*, and then his interest determines; the lord paramount shall be compelled to make an admittance thereupon. Co. L. 59. b.

But an action upon the case does not lie against the lord, if he refuses to admit; for there is no remedy but in equity. R. 2 Cro. 368. 1 Rol. 108. l. 20. 30. 2 Bul. 337.

So, if by custom the lord ought to admit to a copyhold whom the copyholder names for his successor, and the lord refuses, an action upon the case does not lie. R. Mo. 842. R. 2 Cro. 368. 2 Bul. 337. 1 Rol. 125. 195. (o)

(G 11.) Of what effect it shall be.

If a man be admitted to a copyhold upon a void presentment, he has thereby the customary estate and title to the possession, and is capable

(n) 1. Or the court B. R. will grant a mandamus to compel him. 2 T. R. 484. D. Ibid. 198. Vide infra, (H 1.)—2. And it is no ground for stopping such mandamus, that the party applying for it objects to the fine the lord proposes settling; because the right to the fine does not accrue until after admittance. Ibid.—3. But no mandamus shall be granted for the admission of an heir, because he has a complete title against all the world, except the lord, before admittance. 2 T. R. 197.

(o) 1. But where the jury were bound to present the conveyances of burgage tenants, and the lord would not hold a court and summon a jury, the court granted a mandamus to compel him to hold a court, summon a jury, and admit the persons who should appear upon the presentments entitled to admission, and to oblige the jury to make the presentments. 1 Wils. 283.—2. An admittance upon a claim of right will give no better title than the right claimed. 7 East, 186. Though the real title is in the lord. Ibid.—3. The lord granted a copyhold to R. F. for the life of H. F. R. F. died, and his administrator claimed to be admitted as administrator, and was admitted accordingly. Ejectment by him; but on a case reserved, the court held he had no title, because there could be no general occupation of a copyhold, because of the freehold in the lord; and because the admittance, which imported to be on a claim of right, would give no title if that claim was unfounded. 7 East, 186.

of a release from him who has the right. R. 4 Co. 25. Kite. 1 Rol. 504. l. 50.

But if he enters upon a copyhold of a manor in the hands of the king, he has no interest, but possession against a stranger. R. 3 Leo. 221.

So, if a copyholder in remainder enters upon a copyhold for life, he has not the customary interest for life, but is a disseisor; and if he afterwards surrenders, it avails nothing. R. 1 Mod. 199.

If a copyholder leases for years, and afterwards surrenders two parts of the reversion, the surrenderee, being admitted, shall distrain for two parts of the rent, without attornment or notice; for the surrender is notorious. R. Ray. 18. R. Hob. 177. (p)

[*](H) FINE.

(H 1.) When due.

By custom, a fine shall be paid to the lord upon every alteration of his tenant; and therefore, if a copyholder in fee dies, a fine is due to the lord upon admittance of the heir. Co. L. 59. b. Kit. 122. a.

[But the lord is not entitled to the fine till after admittance. 2 Term Rep. 485. Vide supra, (G 10.)]

And if the heir dies before admittance, it shall not prejudice the lord as to his fine.

Or, if he surrenders before admittance. 4 Co. 22. b.

[But if copyholder surrenders to the use of his will, and by will orders and directs two trustees to make sale of his copyhold, and apply the money to certain purposes; they may sell without being admitted, and the lord shall admit the vendee, and have but one fine. 2 Wils. 400.]

[So if a copyholder covenant to assign and surrender to B., which covenant is presented by the homage, but before any surrender, B. assigns his interest to C., to whom the copyholder surrenders; C. has a right to be admitted on the payment of one fine. 2 Term Rep. 484.]

So, if a copyholder makes a surrender, a fine is due upon admittance of the surrenderee. Co. L. 59. b. Kit. 122. a.

So, if a wife, by custom, has the whole or part of a copyhold for her dower; upon her admission a fine shall be paid. Kit. 123. a.

But half a fine is commonly taken; but that is according to the custom of the manor. Ibid.

So, if a surrender be to A. by way of mortgage upon condition, after the condition broken, the lord shall compel A. to be admitted, and pay a fine, though A. will renew the surrender. Dub. 2 Ver. 367, 8.

So, if a surrender be to A. for life, and afterwards to B. for life, and afterwards to C. in fee, a fine is due for them in remainder; for though the admittance of A. is an admittance of them in remainder, yet it shall not prejudice the lord for his fine. D. 3 Co. 22. Brown. R. 4 Co. 23. Finch.

(p) 1. Admittance to a copyhold will confer no estate where the grant itself confers none. 3 East, 260. 7 East, 23.—2. The ceremony of admittance to copyholds is for the lord's sake only. Therefore, as against all persons but the lord, the title of the surrenderee after admittance is perfect as from the time of the surrender, and shall relate back to it. 4 Burr. 1952. 1 T. R. 600. 16 East, 208.—3. Where the devisee of a customary estate, which had been surrendered to the use of the will, died before admittance. Held, that her devisee, though afterwards admitted, could not recover in ejectment; for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the last surrenderor. 7 East, 8. 3 Smith, 6.

Cont. per Poph. 1 Rol. 505. l. 50. R. Cont. Mo. 358. 465. D. acc. 1 Vent. 260. Per Kit. acc. but others cont. Kit. 122. b. R. 1 Mod. 120.

And the lord may set a fine for the particular estate, and another for the remainder. D. 1 Vent. 260.

But there ought to be a special custom, otherwise a fine is not due for a remainder. Per two J. 3 Lev. 308. Per two J. Cro. El. 504.

[*]And if another fine is set for a remainder, it is only half. Kit. 122. b.

And it need not be paid till the remainder comes into possession. Per Wild. 1 Vent. 260.

If a copyhold be granted to A. for years, who dies during the term; the executor shall be admitted, and pay a fine. Per Weston, others cont. 3 Leo. 9. [Acc. 1 Bur. 206. 218.]

So, by custom, a fine may be due upon the death of the lord. Co. L. 59. b.

But not upon the alienation of the lord; for that would be unreasonable. Ibid.

[In a manor where by custom a general fine is due from all the tenants, on the death of the last admitting lord; husband tenant for life by virtue of marriage-settlement is entitled to the fines on the death of his wife, the last admitting lady. Str. 654. Fort. 41.]

But if two or three are admitted together, one fine only is due; for they make but one tenant. Kit. 122. a.

So, if a surrender be to husband and wife, and the heirs of the husband, there is but one fine due upon admittance of the husband and wife. Ibid.

So, if a copyholder surrenders to himself for life, and afterwards to B. and his heirs, and dies before the next court; B. shall pay but one fine upon his admittance. Kit. 122. b.

So, upon a common recovery, there shall be but one fine paid; for the recoverors are in the post, and pay no fine. Ibid.

So, if a copyholder for life and he in reversion or remainder, join in a surrender, the surrenderee shall pay but one fine. Kit. 123. a.

So, if there be no new tenant, no fine shall be paid; and therefore, if a copyholder surrenders to A. for life, who dies; the surrenderor shall pay no fine to be re-admitted. 9 Co. 107. 1 Rol. 505. l. 45.

So, if one joint-tenant dies, the survivor shall have the whole without paying any fine to be admitted. Kit. 122. a.

So, if a surrender be upon condition, and the surrenderor enters for the condition broken; he shall not pay any fine. Kit. 123. a.

If a woman has a copyhold for the nonage of her son, and takes a husband, and dies before her son is of full age; the husband shall have it without a new fine. Per two J. 3 Leo. 9.

(H 2.) When to be set, and how. [Vide supra, (H 1.)]

No fine shall be imposed till admittance. 1 Rol. 506. A. for the admittance is the cause of the fine. R. 4 Co. 28. a. Hubbard. D. 1 Vent. 260.

If a copyholder holds several copyholds, by several services, there ought to be upon every one a several fine. R. 4 Co. 27, 8. Hubbard; for he may pay one, and forfeit for the other. Ibid. Cro. El. 779. Mo. 622.

So, if all the several copyholds are surrendered to one *tenend' per antiqua servitia*; for the tenures remain several, and the fines ought to be several. R. 4 Co. 28. a. Hubbard.

[One gross fine cannot be assessed on the admission to several copyhold [*182]

[*]tenements; and if it be so stated in the declaration in an action for the fine, it is error, and not cured by verdict. Doug. 722.] (q)

(H 3.) Fine certain.

A fine may be certain, by custom. Co. L. 59. b.

If the custom allows for a fine a year's value of the land, it is good; for the value is sufficiently certain, and triable by a jury. R. 3 Lev. 255. 3 Mod. 133. Carth. 13.

So, a fine of one penny for 100 acres or more, is good. Kit. 103. a.

So, 6s. 8d. for every messuage, cottage, or toft, or every acre of land, though as much be paid for one as the other. Kit. 103. a.

So, a fine at the will of the lord for the first purchase, and nothing afterwards. Kit. 103. b.

If the lord demands a fine certain, it is no evidence of its uncertainty that he has paid less; for the lord may take a less sum. D. 2 Bul. 32. D. cont. per Richardson, Lit. 252.

Otherwise, if he has paid more. D. 2 Bul. 32.

If a jury find a fine certain, chancery will decree it to be an uncertain fine upon examination of the rolls. D. Lit. 252.

If a fine certain hath been paid from the time of H. 6. and it appears by the roll to have been uncertain before; it is not a fine certain. Godb. 265.

A fine certain ought to be paid immediately. 4 Co. 28. a. Hubbard. Cro. El. 779. Mo. 623.

(H 4.) Fine uncertain.

So, sometimes a fine, by custom, is uncertain and arbitrary. Co. L. 59. b.

Or, by custom, may be assessed by the homage, where the lord does not agree. Noy, 2, 3.

But though it is uncertain, it ought to be reasonable; otherwise the copyholder is not compellable to pay it. Co. L. 59. b. R. 4 Co. 27. b. Hubbard. 1 Rol. 507. l. 25. R. Mo. 622. Cro. El. 779. R. Co. Ent. 647. c.

Whether a fine be reasonable or not, shall be determined by the justices upon the circumstances appearing in the case. Co. L. 59. b. R. 4 Co. 27. b. Hubbard. Mo. 623.

And therefore, if an action be brought against a copyholder by the lord, it shall be referred to the court upon demurrer. 4 Co. 27. a. Co. Ent. 647. c.

Or, the defendant may plead not guilty, and upon proof of the value of the land, and other evidence, the court will judge. 4 Co. 27. a. Hob. 135. Co. Ent. 647. c.

For, if a copyholder prays a mitigation, it does not conclude him, but that he may afterwards insist on the unreasonableness of the fine. 1 Rol. 507. l. 30.

[*]And there may be a custom, that if the lord and surrenderee do not agree for the fine, the tenants ought to assess it. R. 1 Rol. 48.

Yet if a copyholder brings trespass against his lord, who justifies his entry for non-payment of a fine; it ought to be shewn on the part of the copyholder, that it is unreasonable. R. Hob. 135.

(q) In assumpsit for a fine on admission to a copyhold, where the lord remitted a part of the fine: held, that it was not necessary to prove an entry on the court rolls, either of the original assessment of the fine or the re-assessment; for the lord, and not the homage, is to assess the fine. 2 Smith, 225. 6 East, 56.

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If the lord demands 5*l.* upon admittance to a copyholder of 30*s.* per ann. it is unreasonable. R. 1 Rol. 75.

So, if he demands for an admittance upon a descent, above two years value. Semb. 2 Mod. 230. But two years value is reasonable. R. Ch. R. 464. Adm. 2 Bul. 32. [Doug. 724. n. to 727. n. And the lord is not bound to make any deduction on account of the land-tax. Doug. Ibid.]

So, if he demands two years and a half rent for an admittance upon a surrender; for one year and a half is sufficient. R. Cro. Car. 196.

Or, the value of two years for an admittance upon a surrender. R. Co. Ent. 647. c.

[Fines shall be set according to the present improved value, not according to the rent under a lease then subsisting by licence of the lord. Str. 1042.]

[On admission to a mansion-house then unlet (and which had continued unlet for eighteen years when action was brought) and a piece of land let at 7*l.* per annum; 150*l.* being the fine paid at the last admission, is not unreasonable. 3 B. M. 1717.]

But if by custom a fine is only due on the first purchase, and he and his heirs pay no fine for any land purchased there afterwards; the lord may set what fine he pleases. Kit. 103. b. (r)

(H 5.) When it shall be paid.

A copyholder need not pay an uncertain fine immediately, for he cannot know how much it will be; and therefore, if the lord does not limit a time for payment, he shall have a convenient time. R. 4 Co. 27. b. Hubbard. R. Cro. El. 779. Mo. 622. (s)

(H 6.) Remedy for a fine.—By action.

If a copyholder refuses payment of the fine, debt lies against him. Per two J. 1 Sid. 58. D. to be R. 2 Mod. 230. 232. Adm. and a declaration there in debt for refusal of such fine. Lut. 597. Cliff. 244. Vide Ent. 176. R. Per three J. Holt cont. 3 Mod. 240. 3 Lev. 261. Sho. 35. 2 Vent. 175.

So, by the executor of the lord. Adm. 3 Lev. 261.

So, an indeb. assumpsit. R. 3 Mod. 240. 3 Lev. 262. Per. three J. Holt cont. Sho. 35.

[If a fine is assessed on admission of an infant, assumpsit would lie whilst he is an infant; (Semb. per Yates J.) but certainly after he [*]comes of age, and has renounced the estate, but confirmed the transaction by enjoying. 3 B. M. 1717. Doug. 727.]

[Assumpsit lies against a steward for the excess of a fine obtained by coercion. 4 T. R. 564.]

(H 7.) By seizure as forfeited.

And non-payment of a fine, apparently reasonable, upon demand, is a forfeiture of the copyhold. R. 1 Rol. 507. l. 20. Vide post, (M 4.)

(r) An excessive assessment of a copyhold fine is not made good by a *remittitur* of the excess. 3 B. & P. 346. Dougl. 732.

(s) And since the fine is not due until admittance, the title is complete without payment of it. 1 East, 632.

Though he pretends that he does not know what fine is due, &c. if such pretence is merely groundless and covinous. Semb. Ray. 42.

But if a fine is unreasonable, refusal of payment is no forfeiture. 1 Rol. 507. l. 25. Vide ante, (H 4.)

Or, if it was dubious, whether a fine was reasonable or not, though it was adjudged reasonable. D. 1 Rol. 507. l. 35. R. Ray. 42. 2 Mod. 231.

So, if it be dubious, whether a fine is certain or uncertain; a refusal to pay an uncertain fine, if he tenders the fine certain, is no forfeiture. R. 2 Cro. 617. R. Ray. 42. Semb. 2 Mod. 229.

Yet if a day is appointed for payment of the fine, and he does not appear to excuse his default, though he tendered the fine certain at the time when it was assessed, it is a forfeiture. R. 2 Cro. 617.

So, if it is dubious, whether a fine be due or not, a refusal is no forfeiture. R. 3 Lev. 309.

So, it is no forfeiture, if there was not a demand from the person of the copyholder at the time limited for payment of the fine, or afterwards. R. Hob. 135. Semb. Ray. 42. Cont. Co. Ent. 647. d. Acc. 2 Mod. 229.

And if the lord justifies in trespass for non-payment of the fine, he ought to shew a demand. R. Hob. 135.

But the demand may be by the steward, without authority in writing. R. 2 Mod. 229.

So, it is no forfeiture, if there was not an express refusal. Co. Ent. 647. Vide post, (M. 4.)

Or, if he refuses before the time appointed for payment, if he pays at the time. Co. Ent. 647. d.

Entry for a forfeiture ought to be by the lord, or another to his use.

But an entry may be without precept from the steward. R. 2 Mod. 229.

[Infants and femes-coverts, being entitled by descent, or by surrender to the use of a will, to be admitted to any copyhold, may, in their proper persons, or a feme-covert by her attorney, and an infant by his guardian, or, if he has no guardian, by his attorney, appear at one of the three next courts for the manor of which the copyhold premises are parcel, and offer themselves to the lord or his steward to be admitted tenants. St. 9 G. 1. c. 30. s. 1.]

[In default of which appearance, either in proper person, or by attorney or guardian, the lord or his steward, after three several courts duly holden, and proclamations regularly made, may nominate and appoint, at any subsequent court, any fit person to be guardian or attorney for that purpose only, and by such guardian or attorney, admit such infant or feme covert, and on such admittance [*] may impose such fine as might have been set, if such infant had been of full age, or such feme-covert sole and unmarried. Id. ibid.]

[On such admittance the fine imposed may be demanded by the bailiff or agent of the lord, by a note in writing signed by the lord or his steward, to be left with such infant or feme-covert, or with the guardian of the infant, or husband of the feme covert, or with the occupier of the messuage, &c. to which such admittance was made. s. 2.]

[If the fine be not then paid, the lord may enter and receive the profits of the copyhold till he be satisfied, accounting for the overplus to the infant or feme-covert. Id.]

[If the guardian of the infant or husband of the feme-covert pay the fine, [*186]

they may reimburse themselves out of the rents of the copyhold. s. 4. Vide post, (M 4.)] (t)

[I 1.] A COPYHOLDER SHALL ALIEN ONLY BY SURRENDER.

A copyholder has no other evidence for his tenements, but a copy of the court-roll. Lit. s. 75.

And therefore he cannot alien by deed.

Nor by will, without a surrender to the use of his will. Vide ante, (F 9.)

Unless there be a special custom, that he may demise without a surrender; for then it shall be good. R. Lit. 26. Adm. Cart. 71.

So, if a copyholder be ousted by disseisin, he cannot release by deed to the disseisor; for he has not the customary estate upon which a release may enure, and it would be a prejudice to the lord, who would lose his fines and services. R. 4 Co. 25. b. Kite. R. 1 Leo. 102.

But if a man be admitted to a copyhold upon a void surrender; he, who has right, may release his right by deed, and by this release his right is extinct. R. 4 Co. 25. Kite. Co. L. 60. a.

So, if a copyholder surrender upon condition, he may afterwards release the condition by deed; for it cannot pass by surrender. R. 2 Cro. 36. Vide 4 Co. 25. Kite.

So, if a lord grants the inheritance of a copyhold to A., the copyholder may release by deed to A. and thereby extinguish his customary interest. R. 1 Leo. 102.

So, if A. and B. are admitted to a copyhold jointly, one of them may pass his estate, by release, to his companion. R. Winch, 3.

So, a copyholder may sell or release his copyhold to the lord, by deed. R. Hut. 65. (u)

[*][A recovery in C. B. is not good of copyhold lands; but of customary freeholds which pass by surrender in a borough court, it may. 1 Atkins, 474. Vide post, (L).] (x)

(I 2.) But a defect of the roll shall be amended.

If there be an omission in an entry upon the roll, upon proof the roll shall be amended; for the roll does not conclude the copyholder to plead, or give in evidence the truth of the matter. R. 4 Co. 25. Kite.

And therefore, if a surrender upon condition be presented, and the con-

(t) (H 8.) Steward's fees.

1. Where a person is admitted to several distinct tenements, the steward of the manor is not entitled, as a matter of general right, to the full fees on each admission separately; and, therefore, where no custom prevails in the manor to that effect, he must stand on his *quantum meruit*. 2 Mars. 84. 6 Taunt. 425.—2. Where there is a custom in a manor for the payment of a separate set of fees to the steward, upon the surrender of each separate tenement, and two are admitted as tenants in common of one piece of land; payable, although the land is afterwards conveyed to one person, as in the case of indivisible services. 2 Smith, 449. 6 East, 476.

(s) 1. Though copyholds can only pass by surrender and not by release; yet a release given by one claiming title to the tenant in possession will extinguish the releasor's title or claim. 10 East, 583.—2. The grant of the reversion of a copyhold to the tenant for life thereof, *habendum* for the lives of others, though inoperative as to him, cannot enure, without a custom, to confer an estate on the *cestui qui vires*. 3 East, 260.

(x) 1. A common recovery has the same operation upon copyholds as upon freeholds. 5 T. R. 104.—2. A fine levied by a copyholder, who afterwards continues in possession, is void as to the lord. 3 T. R. 173.

dition is not entered upon the roll, it is not void; but the roll shall be amended. Ibid.

So, if the day of the court be mis-entered upon the roll, it shall be amended upon evidence, and shall not prejudice. R. 1 Leo. 290.

(K) WHAT A COPYHOLDER SHALL DO BY CUSTOM.

(K 1.) Shall be tenant by the curtesy.

What a copyholder may, or ought to do, and what not, the custom directs. Co. L. 63. a.

And therefore, by special custom, the husband may be tenant by the curtesy of a copyhold, which he has in right of his wife. Adm. 2 Leo. 208. 1 And. 192.

But the custom shall be taken strictly, and therefore, though the husband of one, who had a copyhold at the time of the marriage, shall be tenant by the curtesy, yet he shall not, if the copyhold descends during the coverture. R. 2 Leo. 109. 208. [Vide 1 P. W. 69. per two J. cont.]

(K 2.) Shall have dower.

So, by special custom, the wife may have all the land of her husband, after his death, for dower, or free-bench. 3 Lev. 385. Lit. s. 37.(y)

[Free-bench is a widow's estate in such lands as the husband dies seised of; not that he is seised of during the coverture, as dower is. 2 Atkyns, 525. Vide Cowp. 481.]

[Therefore, where by the custom a tenant for life of three lives had a power of surrendering the whole estate, and by licence from the lord demised by way of mortgage for 99 years, this was held to defeat the widow of her free-bench, though only one instance of a lease by licence was given in evidence. Cowp. 481.](z)

[If a man before marriage settles on his wife part of his real estate for jointure, in bar of all dower which she may claim out of any [*]lands, tenements, messuages, and hereditaments, of which he is or shall be seised, of freehold or inheritance; she cannot claim her free-bench in copyholds purchased afterwards. 1 Vezey sen. 54.]

Or, a moiety, or third part of his land. Co. L. 33. b.

Or, only the fourth part of his land. Ibid.

Or, the whole, or a moiety, *dum sola & casta vixerit*. Kit. 105.

Or, during her widowhood. Hob. 181. Noy, 2.

Or, a woman being espoused when a virgin, shall have all the land whereof her husband dies seised. Kit. 102. a.

Or, the wife, by custom, shall have a third part of the rent of her husband's land, and not the land itself for her dower; as, at Bush. Kit. 102. b.

So, by custom, the wife surviving shall have the fee, and the husband *converso*, Noy, 2.

And sometimes the wife, by custom, shall be admitted to her dower, after the death of her husband. Vide Kit. 123. a.

And shall pay a fine. Vide ante, (H 1.)

(y) She is not dowable of a trust estate. 4 B. C. C. 520.

(z) 1. When the husband does not die *seised* of the legal estate, his widow cannot claim her free-bench according to the custom. 3 East, 260 — 2. Yet the widow is entitled to her free-bench in copyhold land surrendered to the use of the husband, though he never may have been admitted thereto. 5 Burr. 2764.

Sometimes she shall have it without admission, as an excrescence from the estate of her husband. Hob. 181.

But a custom, that the wife shall have dower assigned by the homage, without the answer of the terre-tenant, or a plaint, or process against him, is ill. Kit. 103. b.

Or, that the wife shall have dower assigned of the land, where the husband, before marriage, has made a lease for life, rendering rent. Kit. 103. b.

When, by custom, the wife has dower, she shall have all incidents; and therefore shall recover damages upon the st. of Merton, if her husband dies seised. R. 4 Co. 30. b. Shaw. Mo. 410. Cro. El. 426.

But she shall not have debt for damages given upon the st. of Merton in a court baron, except in the same court, or in chancery. 4 Co. 30. b. Shaw. Yet Moore says, that three J. then held that debt lies in B. R. for damages assessed there above 40s. Mo. 410, 411.

So, she shall not have ejectment for a third part of the copyhold before it be assigned in court. Per Pemb. 2 Sho. 184.

If the husband purchases the inheritance of his copyhold, which is conveyed to A. for his life, and afterwards to his right heirs; the dower of his wife is not extinct, for the customary estate of the husband remains for his life, out of which the dower is excrescent. R. Hob. 181. 1 Rol. 510. l. 40. 2 Cro. 126. 573. 2 Rol. 179.

If the wife be divorced *a mensa & thoro*, yet she shall have her dower. R. Hob. 181.

But if the husband makes a lease for years by license, the wife after his death shall not avoid it; for the lessee also is in by the custom. R. 2 Cro. 36. Mo. 758. [Cowp. 481.](a)

So, if the husband be a bankrupt, and his copyhold is sold by the commissioners, the wife shall not have her dower; for the husband did not die tenant (as he ought by the custom,) though the bargainee was not admitted. R. Cro. Car. 569.

[*]So, if the husband surrenders to A. and dies, and afterwards A. is admitted, the wife shall not have her dower; for upon admittance A. shall be in from the time of the surrender. R. 3 Lev. 385. 1 Sal. 185. Skin. 406.

So, if the husband, a copyholder for life, where, by custom, his wife shall have dower, takes a lease for years; the copyhold is determined, and the wife shall not have dower. R. Jon. 462.

(K 3.) Shall make leases.

A copyholder may make a lease for one year, without a licence. R. 2 Cro. 402. 9 Co. 75. b.

And thereupon may maintain an ejectment. Mo. 539. 569. 128. Cont. Cro. El. 483. R. 4 Co. 26. Melwich. Vide post, (P 3.)

And by special custom, for three, nine, or twenty-one years. Kit. 102. b.

Or for life, and forty years after. Mo. 8.

But a custom that the lease shall be void, if the lessor dies, is good. R. Lit. 235. Hut. 101.

Otherwise, if the lessor alien. Per two J. Lit. 235. Hut. 101.

(a) And where the husband may bar the widow's free-bench by surrender, any act by him for valuable consideration will bar in equity. 3 Ves. 256,

But a lease for several years, without licence from the lord, is not good without a special custom. Per three J. Mo. 272. R. 1 Brown, 133.

Though the lease be made without indenture by parol. 1 Rol. 507. l. 45. Cro. El. 409. Mo. 392.

Though it be not in possession, but commence *in futuro*. R. 1 Rol. 507. l. 45. Cro. El. 499. Mo. 392.

Though the lease be for one year & *sic de anno in annum* for ten years; for this is a lease for ten years. R. 2 Cro. 301. 308. Vide post, (M 2.)

Or for a year & *sic de anno in annum*, during the life of the lessor; for this is a lease for two years at least. R. 1 Rol. 507. l. 55.

Or *de anno in annum*, excepting one day in every year. R. 1 Rol. 508. l. 2. 1 Bul. 215. 2 Cro. 308.

So, if a copyholder makes three leases together each for one year only, and each to commence 27 M. after the end of the former; it is not good, for it is only a shift to evade the custom. R. 1 Rol. 508. l. 10. Cro. Car. 233. Jon. 249.

So, if a copyholder covenants and agrees to make a lease for seven years, and so from seven years to seven years, for forty-nine years; for this amounts to a present lease. 2 Mod. 81.

So a copyholder having licence to lease, ought to pursue his licence; otherwise his lease is void. R. Cro. El. 395.

As, if he has a licence to lease for two years, and he leases for three years. Semb. Ow. 73.

If he has a licence to lease for twenty-one years from Mich. last, and he leases for twenty-one years from 25 Dec. next. R. Cro. El. 395.

If a copyholder in fee has a licence to lease for years, if he so long live, and he leases for years absolutely. Semb. Cro. El. (462.)

So a copyholder having licence to make a lease for twenty-one years, cannot make two leases for that term; for he has satisfied his licence by one lease. R. Mo. 184.

[*]But a custom, that a lessee for life shall make a lease for the life of another is void. R. Mo. 8.

So a lease by an infant of a copyhold shall be voidable. Jon. 157.

What lord may grant a licence. Vide ante, (C 3.)

When a lease without licence, not warranted by the custom, or not pursuant to the licence, is a forfeiture. Vide post, (M 2.)

But if a copyholder makes a lease by licence, the lessee may assign without licence. 1 Rol. 508. l. 28.

Or make an underlease; for the lord by his licence has parted with his interest. R. 1 Rol. 508. l. 28.

So, if the lessor after a lease by licence, dies without heir, the lessee shall have it for his term against the lord; for the licence is a confirmation of the lord. R. Hut. 101, 2.

So a lease without licence is good between lessor and lessee. R. Ow. 18. Lat. 199.

And if a copyhold be to A. for life, remainder to B. in fee, and B. makes a lease for years by parol, and then A. and B. join in a surrender to the use of B., the lease commences presently. R. Cro. El. 160.

If the lord licence his copyholder to make a lease of lands in the tenure of A. though they are in the tenure of B. yet the licence is good. R. 2 Rol. 52. l. 20.

If the lord licence his copyholder for life to make a lease for three years, if he so long live; a lease for three years absolutely, is good; for a lease

by a copyholder for life determines by his death, and therefore the condition annexed, being implied by law, is void. R. Ow. 73. Cro. El. (462.) Semb. 2 Cro. 437. Poph. 105.

So, if he makes a lease for fewer years than his licence allows. R. 2 Cro. 437. R. Cro. El. 535.

If the lord license upon condition, the condition is void; for he grants nothing, but only dispenses with the forfeiture. Per two J. Cro. El. (462.) Poph. 106.

But a licence may be upon a condition precedent; for till the condition is performed, it is no licence. Poph. 106. (b)

A lease from the husband by licence, shall not be avoided by the wife, who claims dower by custom; for the lessee is in under the custom. R. 2 Cro. 36.

So, if a copyholder, after a lease by licence, forfeits his copyhold; the lord shall not avoid the lease. Semb. Hob. 177.

Or dies without an heir. R. Hut. 101. Vide supra.

If a copyholder by licence makes a lease for years, rendering rent, he cannot afterwards surrender the rent without a surrender of the reversion. 1 Leo. 315.

And if he grants the rent, and the lessee attorns, the grantee shall not have debt for it; for he is not privy, nor has the reversion. Semb. 1 Leo. 315.

[*]But the grant is good as a rent-seck. Per Gawdy, 1 Leo. 315.

A lease without licence, not warranted by the custom, is a forfeiture. Vide post, (M 2.)

But makes no disseisin to the lord. Latch, 199. (c)

(K 4.) Copyhold shall descend contrary to the rules of the common law.

So by custom a copyhold shall descend contrary to the rules of the common law; as, by the custom of borough english to the youngest son. Kit. 102. a.

Or to the youngest brother. Ibid.

Or to the youngest daughter. Ibid.

To the youngest son or daughter of the first wife, she being espoused when a virgin. Kit. 102. a. 1 Ver. 489.

So to the eldest daughter only. [Vide 1 Term Rep. 466.]

To the eldest daughter for life, and after her death to the next heir male of the father, who derives his descent by males. R. 1 Sid. 367. 1 Lev. 172. 293.

And if, by custom, the wife has free-bench, and during her estate the eldest dies, the next daughter, being eldest at the death of her mother, shall have it. R. 1 Sid. 267. 1 Lev. 172.

So by custom a copyhold may descend to all the males; as, in gavel-kind, at Islington. Kit. 102. a.

Or to all the brothers. Ibid.

Or to all the sons, if the copyhold contains above five acres; otherwise to the youngest only. Ibid.

(b) Under the demise of a copyhold for one year, and thence from year to year, for such a term "if the lord would licence, and so as the same should not be liable to forfeiture," the licence is a condition precedent to the extension of the lease to the term proposed. 4 East, 221. 1 N. R. 163.

(c) The lessor of a copyhold having engaged to procure from the lord licence for the lessee to commit waste, cannot eject him upon the want of such licence. 2 Taunt. 52.

So by custom if a man purchase bookland and bondland *simul & semel*; it descends to the eldest son. 1 Leo. 56.

So, if he purchase bookland first, and then bondland, both descend to the eldest; but if he purchase bondland first, both descend to the youngest son. Ibid.

So, by special custom a copyholder for life shall name his successor. R. 1 Rol. 562. l. 5. R. 4 Leo. 238. 1 Brow. 132. Otherwise, the lord shall have it. 1 Sid. 267.

So by custom after the death of a copyholder for life, the lord ought to admit his eldest son for life, and if he has no son, his daughter. Adm. Mo. 788.

[A single admittance at a court leet and court baron, is evidence to prove the custom for lands to descend to the youngest nephew, though there is a presentment that the custom extends only to the youngest son, and youngest brother, and no farther. 3 Wils. 63.]

[A customary of a manor, appearing to be of great antiquity, and delivered down with the court rolls from steward to steward, though not signed by any person, is good evidence to prove the course of descent within the manor. 1 Term Rep. 466.]

[*](K 5.) The lord shall appoint a guardian. [Vide Guardian, (B 1.)]

So by special custom the lord shall name guardian to the heir of his copyholder, who is within age, the next of blood, to whom the copyhold cannot descend. Kit. 103. a. Vide ante, (E).

Or shall give the custody to his bailiff, who shall render an account to the heir at his age of fourteen years. Kit. 103. a. Dy. 302. b. in marg.

Or otherwise shall dispose of it according to the custom of the manor. 3 Lev. 395.

As by custom the lord may assign a copyhold to any one, during the infancy of the tenant, without account. Semb. 1 Leo. 266.

So by custom the heir at the age of fourteen years may chuse a guardian for himself. Kit. 103. a.

But a copyholder cannot dispose of the custody by his testament within stat. 12 Car. 2. 24. R. 3 Lev. 395. If there be a special custom, that the lord shall assign a guardian to his infant copyholder. R. in the same case, Lut. 1190.

If the lord by custom appoints a guardian to his copyholder, such guardian shall have debt, &c. in his own name, for rent upon lease of the copyhold. Dy. 302. b. in marg.

And shall have *ejectione custodiæ*. R. Cro. El. 224. 1 Leo. 328. Vide post, (P 3.)

So, if a copyholder be a lunatic, the lord by special custom may appoint a guardian or committee of his customary lands. Adm. Hob. 215. Hut. 16.

So, if a copyholder be an idiot; for the king shall not have the custody of his copyholds, though *st. prærog. regis* gives to the king the custody of all his lands. 4 Co. 126. Hard. 434. R. Dy. 302. b.

Or *surdus & mutus*. R. 2 Cro. 105.

And the committee shall hold against the *prochein ami* of the copyholder. Ibid.

But such committee shall not sue in his own name, but in the name of the lunatic. R. Hut. 16. Hob. 215.

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(K 6.) Copyholder shall have common.

So by special custom a copyholder shall have common within the waste of the lord. 4 Co. 32. a. Foiston.

Or in *alicno solo*. 4 Co. 32. a.

So by custom he may have sole pasture in the waste of the lord. R. 2 Sand. 327. Pol. 16. Dub. Vau. 255.

And may claim sole pasturage for his cattle though not levant and couchant. R. Pol. 20. 2 Sand. 327.

But he can have common only for his cattle levant and couchant. Adm. 2 Sand. 327.

So he may license a stranger to put his cattle into sole pasture. R. 2 Sand. 327. Pol. 23.

But not into common. Adm. 2 Sand. 327.

So a single copyholder may allege a custom to have common within the waste of the lord. R. 4 Co. 32. a.

So by special custom a copyholder may have estovers or other profit within the waste or woods of the lord. 4 Co. 32. a.

[*][A copyholder in fenny lands may be entitled to dig the lord's soil for turf. 2 Atkyns, 189.]

[Common of turbary cannot belong to an occupant. Ibid.]

And though the lord sells his waste, and afterwards grants a copyhold, the copyholder shall have common. 1 Brow. 231. Vide post, (K 7.)

But if the lord enfeoff his copyholder, who has common by custom, whereby the copyhold is destroyed, he shall not have common; for it is gone. R. 1 Sal. 170.

So, if he confirm the estate of the copyholder *cum pertinentiis*. R. 2 Cro. 253. 1 Bul. 2. Yel. 189. 1 Brow. 209.

So, if the lord by deed grants the freehold of a copyhold, to which estovers belong, to his copyholder, with all lands and hereditaments appurtenant or used with it; the estovers are destroyed. R. 2 Cro. 253. Mo. 667. 2 Bro. 211.

So, if the lord grants the freehold of a copyhold, to which common belongs, with all profits and common appurtenant; the grantee shall not have common, for it was appurtenant to the customary estate, not to the freehold. R. 2 Rol. 61. l. 5. D. cont. 1 Bul. 2.

Though the grant was only for years. R. 2 Rol. 61. l. 10.

Yet, if a copyhold to which common belongs escheats, and the lord, by deed, grants it with all common appurtenant, or used with it; the grantee shall have common, for it amounts to a new grant, though the antient common was extinct. R. Cro. El. 794. 2 And. 169.

So, if a copyholder has common out of the manor, and be enfranchised, his common remains, for it belongs to the land. 1 Sal. 170. (d)

(K 7.) Shall take trees, [prescribe and transfer his privileges to a sub-lessee.]

So, by special custom, a copyholder in fee may cut down trees, and sell them at his will. R. 1 Rol. 560. l. 25. Cro. Car. 221. Dal. 8. Noy, 2.

So a copyholder for life, who by custom names his successor; for he has

(d) 1. But common which he had within the manor is extinct. Salk. 170. 366. 6 Mod. 20.—2. A copyholder shall have the acorns the trees upon his copyhold produce. Ld. Rd. 352.—3. And the young birds and animals which breed there. Ibid.

quasi an inheritance. R. 1 Rol. 560. l. 35. 1 Brow. 132. 2 Brow. 87. Noy, 2.

[Where a copyhold is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut timber growing on the estate. 2 Term Rep. 746.]

And one single copyholder may prescribe to have power to cut trees. R. Cro. El. 353. 4 Co. 32.

But a copyholder for life merely cannot cut down and sell; for such custom, that a copyholder, who has not any interest but for life, may cut down trees at his will, is void. R. 1 Rol. 560. l. 30. Adm. 3 Bul. 81. R. 2 Cro. 29. R. Cro. Car. 221. R. 1 Bul. 158. 2 Brow. 85. Noy, 2. Jon. 245. (e)

Or that every copyholder may cut. Win. 1.

So a custom, that a copyholder may pull down houses, is void. D. 1 Bul. 51.

[*]So, by special custom, a copyholder shall take timber for housebote, hedgebote, cartbote, &c. R. Cro. El. 5. Adm. Mo. 812.

So it seems without a special custom. Per Holt, Sal. 638. (f)

And if the lord cut down trees, where by custom the copyholder shall have the lops; an action upon the case lies against the lord. R. 1 Rol. 196. 1 Brow. 231. 1 Rol. 108. l. 10.

Or trespass. Per cur. inter Ashmede and Ranger, R. 12 W. 3. (Com. 71. Sal. 638. Ld. Ray. 551. But reversed in Parl. Sal. 638. Ld. Ray. 551.) R. 1 Leo. 272.

So if the lord bargains and sells his trees, and the bargainee cuts them down, an action upon the case lies against the bargainee. R. 1 Brow. 231.

So if the lord demises the manor for years, except the trees, and the lessee grants a copyhold; the copyholder shall have the lops of the trees, for they are parcel of the manor. R. 1 Brow. 231.

Otherwise, if the lease was for life; for then they are severed from the manor. Ibid.

So if a copyholder for life does waste, and cuts down trees, &c. he in remainder shall have an action upon the case. Dub. 3. Lev. 131.

So if a stranger cuts down trees upon a copyhold, the copyholder shall have an action upon the case for the loss of shade, fruit, &c. though it was not the custom for him to take the trees. 3 Lev. 131.

So the lord also, for the prejudice to his inheritance. 3 Lev. 131. Vide action upon the case for Misfeasance, (A 2.)

So the lord may have trespass. 2 Rol. 551. l. 50.

So a copyholder shall have trespass *quare clausum fregit et succidit*. 2 H. 4. 12. 4 Co. 21. b.

So, where there is not a special custom for the copyholder to cut, the lord may cut, and the copyholder has no remedy against him; though he be copyholder for life, and pleads that he has not sufficient for repairs. R. cont. in B. R. and Exch. but reversed in Parl. Sal. 638. (Ld. Ray. 551.)

So the lord may grant all the wood.

(e) So a custom that a copyholder who holds to him and his heirs for three lives is bad. 2 T. R. 746.

(f) He may without a special custom cut off the under boughs, but not the upper ones. Cro. Eliz. 321. pl. 21.

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And if he grants to a copyholder, the benefit does not merge in his copyhold. 1 Ver. 22. (g)

(K 8.) Shall render his services.

A copyholder ought to do his services to the lord. 42 Ed. 3. 25. b.
When a denial of services is a forfeiture. Vide post, (M 4.)

(K 9.) Fealty.

Tenant by copy shall do fealty. Co. L. 63.

When a freeman does fealty, he shall put his right hand upon the book, and shall say, I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and I shall lawfully do to you the customs and services, which I ought to do at the [*]terms assigned; so help me God: then he shall kiss the book. By the st. 17 Ed. 2. Lit. s. 91.

But a villein shall say, I from this day forward shall be to you true and faithful, and shall owe you fealty for the lands that I hold of you in villenage, and shall be justified by you in body and goods. So help me God. By the st. 17 Ed. 2. Rast. Co. L. 68. a.

Tenant by copy shall do fealty in person; for he cannot swear by attorney, 9 Co. 76. Co. L. 68. a.

But the steward may take fealty for his lord. Lit. s. 92.
Or the bailiff. Ibid.

(K 10.) Rent.

A copyholder shall render rent.

And if the copyhold comes to the lord by escheat, &c. he may make a grant of it, rendering a greater rent. Per Lea, 2 Rol. 236.

But if a man by deed demises a copyhold and free-land, rendering rent; the whole rent shall issue out of the free-land, for the lease without licence is void as to the copyhold. Per Dy. Mo. 50.

So if a copyholder surrenders, rendering rent; the reservation of rent is void. Dy. Mo. 352.

And if the lord, upon a surrender makes an admittance, rendering a greater rent the reservation is void. 2 Rol. 236.

(K 11.) Relief.

So by custom, a copyholder shall be bound to pay a relief to his lord, either by tenure or reservation. Jon. 133. [Vide st. 12 Car. 2. c. 24. s. 5, 6, 7.]

And by custom, it may be but 1*d.* though the rent be 10*s.* Kit. 103. a.

Or a moiety of the rent upon a descent, and as much upon a purchase. Kit. 103. a.

So, by custom, a relief may be due upon alienation. Latch, 95.

And a devise shall be an alienation. R. Latch, 95.

So every freeholder, who has land by descent within a manor, being of full age, shall pay a relief. Lit. s. 112.

Or being of any age, if he does not hold by chivalry. Kit. 146. Co. L. 91.

So if he dies, his heir being within age, and in ward to the king for all his land, at full age he shall pay a relief to the other lord. R. 2 Cro. 28.

(g.) 1. A copyholder cannot prescribe in a que estate. Dougl. 713.—2. A copyholder is empowered by the custom to cut trees, may annex that privilege to an estate carved out by him for life, though there are no examples to warrant it. 10 East, 266.

So if the eldest son dies before entry, whereby the youngest enters, he shall pay two reliefs. Kit. 146.

If a tenant enfeoffs his heir, and dies before the lord accepts him, the heir shall pay a relief. Ibid.

If the heir after his ancestor's death enfeoffs B. of whom the lord accepts rent; yet he shall pay a relief. R. Cro. El. 885.

But if he dies, his heir being within age, and the lord refuses the ward, he shall not have relief. Semb. 2 Cro. 28.

So if one parcener dies, his heir being of full age, no relief shall be paid; for all the parceners are but one tenant to the lord, and a relief cannot be apportioned. R. 3 Leo. 13.

So if upon a grant in fee farm no rent be reserved, or the full value; no relief shall be paid. Mo. 168.

[*]So he who is in by purchase shall pay no relief. Kit. 146.

So an heir, by descent, of a reversion after an estate for life, shall not pay a relief, till the reversion falls in. Kit. 146. b.

So a tenant by fee-farm shall pay no relief. Ibid.

So none shall pay, except the true tenant in fee. Keil. 82. a.

The lord shall distrain for a relief, and shall not have debt for it. Co. L. 83.

But his executor or administrator shall have debt, and shall not distrain. Co. L. 83, b.

(K 12.) What remedy for rent.

If a copyholder refuses payment of his rent due, upon a personal demand, it is a forfeiture. Vide post, (M 4.)

So if a copyholder surrenders the reversion after a lease to A., who is admitted; the assignee shall have covenant against the lessee for non-payment of the rent, within st. 32 H. 8. 34. R. cont. 2 Cro. 305. Yel. 223. Per Hob. 178. Dub. Cro. Car. 25. D. cont. Cro. Car. 44. R. acc. 3 Lev. 327. Vide post, (N). R. acc. 1 Sal. 185. Sho. 285. Skin. 305.

So he shall enter for a condition broken within the same st. 32 H. 8. 34. Semb. 3 Lev. 327.

So the reversioner may distrain for rent, without attornment or notice. R. Ray. 18. R. Pol. 142. 1 Lev. 40.

So if A. makes a lease of a farm, part copyhold and part freehold, rendering rent, and afterwards assigns the reversion by grant and surrender to B., the rent issues out of both, and B. shall have debt against the lessee or his assignee. R. Cro. El. 606. 622.

(K 13.) Suit of court.—By a copyholder.

So a copyholder shall do suit at the court of his lord.

And he ought to do it in person, and not by attorney; for he is not within the stat. of Merton, 20 H. 3. 10. 2 Inst. 100. R. 1 Leo. 104.

So he cannot do personal services by attorney. 1 Leo. 104.

But a copyholder may compound with the lord *pro secta relaxanda*. Kit. 74.

(K 14.) By a freeholder.

So a freeman may do suit at the lord's court.

But by st. Mark. 52 H. 3. 9. a freeman shall not be distrained to do suit, if he is not bound to do it by his feoffment or prescription.

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And by the same stat. if land, which ought to do suit, descends to parceners, she who has the part of the eldest, shall do suit for all, and the others shall make contribution.

So by the same stat. joint-tenants or tenants in common shall do but one suit for all the land. 2 Inst. 119. 6 Co. 1. b.

So a feoffee of the eldest's part shall do suit for all the parceners. 2 Inst. 119. 6 Co. 1. b.

So tenant by the curtesy. 2 Inst. 119.

And a woman may be a suitor at a court baron. Ibid.

But where the free-suitors are judges, a woman shall not be judge there. Ibid.

But none shall do suit when he is in ward of the king, or his committee. F. N. B. 158. A.

[*]Nor tenant in dower, of lands in ward of the king. F. N. B. 158. B.

Nor the lessee of the king, of lands escheated or forfeited. F. N. B. 159. A.

So tenant in dower, of any land, shall not do suit; if the heir has sufficient to be distrained for it in the same county. Ibid.

So if the lord purchases part of the land, the whole suit is gone; for he cannot have nor make contribution. 2 Inst. 120.

So if parcel descends to the lord. Ibid. semb.

Yet if a tenant enfeoffs another of parcel, every one shall do suit; for the service being entire, shall be multiplied. Vide 2 Inst. 119. 6 Co. 1. b.

So if land descends to parceners, where the king is lord, all shall do suit; for they are not within the stat. of Mar. F. N. B. 159. C.

And this after partition, or before. F. N. B. 159. C.

(K 15.) By attorney.

By the st. of Merton, 20 H. 3. 10. every freeholder may do suit by attorney at the hundred, court baron, &c.

But he ought to make an attorney under his seal. 2 Inst. 100.

And if the steward does not allow his attorney, he shall have a writ *de attornato allocando*. 2 Inst. 100.

And upon that an *alias*, *pluries*, and attachment, if the refusal be continued. Kit. 74. a.

Such attorney shall do the same suit as the freeholder ought. 2 Inst. 100.

But he cannot be a judge as the freeholder is; for no act can be done in a judicial capacity, by attorney. 2 Inst. 100.—Cont. per Holt; for the stat. makes no difference, inter Hunt and Bourn, H. 1 Ann. 1 Sal. 341. And therefore, a fine in ancient demesne before an attorney of the suitors is good. R. int. Hunt and Bourn, H. 2 Ann. 1 Sal. 340, 1.

(K 16.) Suit real.

Every one of the age of twelve years ought to do service, at the tourn or leet, and take an oath to be loyal, &c. Co. L. 68. b.

Clerks and women were not exempted by the common law. 2 Inst. 121.

And every person is resiant within some leet.

And a person not resiant may be bound to do suit at the leet. Sal. 604.

But by the common law, persons having cure of souls were exempted. 2 Inst. 121. F. N. B. 160. C.

And by the st. Marl. 52 H. 3. 10. *archiepiscopi, episcopi, abbates, priores, comites, barones, viri religiosi, & mulieres*.

And by the equity of this statute, all ecclesiastical persons, secular or regular. 2 Inst. 121.

So, tenant in antient demesne shall not be distrained to do suit at the leet, or sheriff's tourn. F. N. B. 161. C.

This suit shall not be done by attorney; for it is not within the st. of Merton, 20 H. 3. 10. 2 Inst. 99.

But by the st. of Marl. 52 H. 3. 10. a man having land in two leets, shall do suit only where he is conversant.

[*]If his house be within two leets, he shall do suit where his bed is. 2 Inst. 122.

If his family is within two leets, he shall appear where he is commorant. Ibid.

And the servant shall be said to be resiant, where the master is. Kit. 33. b.

(K 17.) Remedy for suit.

For suit-service the lord may distrain. 2 Inst. 118.

For suit by parceners before partition, the lord may distrain any of them to do suit. F. N. B. 159. E.

So, after partition; but then the others shall have a writ against the eldest parcener to do suit, and she shall have a writ *de contributione facienda* against those who refuse contribution. 2 Inst. 119.

But a writ *de contributione facienda* does not lie before partition; for it is not within the st. of Marl. 9. 2 Inst. 119.

Nor in the case of the king does it lie, before, or after partition; for the st. Marl. 9. does not extend to the king's courts. Ibid.

So, for suit of joint-tenants, the lord may distrain each. Ibid.

But if one does suit, he shall not have a writ *de contributione facienda* against the others; because the possession is entire. Ibid.

So, for suit by tenants in common, the lord may distrain either, and he shall have a writ *de contributione facienda*. 2 Inst. 119.

By st. Marl. 52 H. 3. 2. the lord shall not distrain for suit-service out of his fee. 2 Inst. 104.

And for suit real, the lord shall not distrain, but there shall be an amercement. 2 Inst. 118.

And for suit of court the lord shall not have a writ *ad sectam in curia sua faciendam*; because he may distrain. Qu. F. N. B. 158. D.

If the lord distrains for suit-service, when it is not within a charter of feoffment, by st. Marl. 9. the tenant shall have a writ *contra formam feoffamenti*. F. N. B. 163.

Which lies only for the feoffee and his heirs, against the feoffor and his heirs. F. N. B. 163. C.

If the lord distrains parceners, joint-tenants, &c. contrary to the st. Marl. 9. the tenant shall have a writ upon the statute *de exoneratione sect.* F. N. B. 159.

So, if he distrains a ward of the king, or any one who ought not to do suit. F. N. B. 158.

So, if the lord distrains persons to come to his leet, who are exempted by the st. Marl. 10. they shall have a writ upon this statute for their discharge. F. N. B. 160. 2 Inst. 121.

So, if he distrains any, who are exempt from suit to the leet, by the common law, they shall have a writ, that he do not distrain them. F. N. B. 161. C.

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But for suit of court, the tenant shall not have a writ of attachment, but only after a writ that the lord shall not distrain him, if he be distrained when he ought not by the common law; though if he be distrained when he ought not by any statute, he shall have an attachment at first. F. N. B. 160. B.

[*](K 18.) Heriot.—What it is.

Heriot is the best beast or other thing, due to the lord upon the death or alienation of his tenant.

But the lord shall have that which he chooses for the best, though it be the worst. Hob. 60.

(K 19.) Heriot-service.—When due.

Heriot may be due by tenure, which is heriot-service, or by custom.

Heriot-service is due only upon the death of a tenant in fee. D. 21 H. 7. 13. a.

Yet it may be reserved upon a lease for life, after the death of tenant for life. R. Lut. 1367.

So, if a lease be to A. for life, afterwards to B. for life, remainder to C. for life, an heriot may be reserved after the death of each of them. 2 Sand. 167.

So, if a lease be for years, if two lives continue, it may be reserved after the death of each life. 2 Sand. 165. R. Lut. 1367. Winch. 47. 57.

If tenant by heriot-service aliens parcel, the heriot shall be multiplied. Fitz. Heriot, 1.

And if the lord be seised of a heriot by the alienee; it continues, though the tenant re-purchase this parcel. Ibid.

But a heriot is not due, if the tenant at his death had no beasts. Semb. Hob. 176. Hut. 4. Dy. 199.

Nor is it due of the goods of *cestui que trust*, but of him who has the legal estate. 1 Ver. 441.

Heriot-service is of the nature of a rent. 2 Sand. 166.

And therefore shall go with the reversion to the heir. Ibid.

Or to the grantee of the reversion. Ibid.

So, if there be a lease for lives, rendering rent, and an heriot upon every death, and afterwards the manor is leased for years; the heriot goes with the reversion to the lessee. R. Win. 47. 57.

So, if a lease be for 99 years, if two lives so long continue, to commence after a death, surrender, &c. of a former lease, reserving an heriot after the death of each life; if either dies before the lease commences, no heriot shall be paid. R. per three J. Keeling cont. 2 Sand. 166. 1 Sid. 437. 1 Vent. 91. 1 Lev. 294. 2 Keb. 677.

So, for the last life no heriot can be seized, or levied by distress, but only by action upon the contract; for by his death the term is determined. Dub. Lut. 1368.

(K 20.) How recovered.—By seizure.

Heriot service may be seized. Cont. per Frowick, Kel. 82. a. 84. b. R. acc. Pl. Com. 96. R. acc. Mo. 540. Cro. El. 590. R. cont. Bend. pl. 47. R. cont. 1 And. 299. Acc. Bro. Heriot, 2. [Willes, 192.]

So, an heriot due by reservation; for that is an heriot service. Dub. Lut. 1367, 8.

[If an heriot be reserved by deed since the stat. *quia emptores*, payable
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by a tenant in fee, it will be considered as rent, and then the landlord cannot seize, but must either distrain, or bring an action for non-payment. Willes, 192.]

[*]And the seizure may be out of his fee. 6 Ed. 3. 36. a. R. Lut. 1367. Bend. pl. 47. Fitz. Heriot, 5. R. 1 Sal. 356.

And, by a stranger to the use of the lord. Per Keble, 2 H. 7. 15. b.

So, if the heriot be eloigned, the beast of another, remaining within his fee, may be distrained or seized. Per Chard, 27 Ass. 24.—Per cur. Kel. 167. a.—It may be distrained, but not seized. Cro. Car. 260.

So, if an heriot be sold, it may be seized in the hands of the vendee, unless the sale was in market overt. Kit. 134. b.

But, generally, the beast of another may not be seized for an heriot. 1 Ed. 3. 6. a. D. Cro. Car. 260.

So, if upon a lease for three lives there be reserved for an heriot upon the death of each his or their best beast, and the lease be assigned, and then one of the lives dies; the beast of the assignee cannot be taken. R. 2 Rol. 451. l. 30. Lut. 1368.

So, upon a reservation of an heriot, the beast of another upon the land cannot be distrained. Dub. 3 Mod. 231. Lut. 1368.

(K 21.) By distress.

So, for heriot service a man may distrain, for it is a service annexed to the land. Per two J. 8 H. 7. 10. b. Pl. Com. 96. a. Cro. Car. 260. Bro. Heriot, 2.

And may distrain the cattle of another continuing upon the land. Cro. Car. 260. Bro. Heriot, 6. Vide ante, (K 20.)

In avowry for heriot service, he ought to prescribe, that he and all those whose estate, &c. ought to have an heriot upon the death of every tenant. 21 H. 7. 13. a. 15. a.

And he ought to show, what land he holds in particular. 21 H. 7. 16. a.

And allege seisin in himself, or in his ancestor. 6 Ed. 3. 36. a. Per three J. 14 H. 4. 5. a.

And shew, whether the heriot be a beast or other thing. R. Hob. 176. Hut. 4.

It is sufficient if it be alleged, that he died his tenant, without saying, that he died seised. Per. cur. 44 Ed. 3. 13. a.

And in avowry for an heriot, he need not shew for what beast, or of what value. R. Cro. Car. 260. Jon. 300.

And if he avow for several heriots, it is sufficient to say, that he took them *nomine heriotor.* generally. R. 1 Bul. 102.

But an avowry, that every tenant at his death hath used to pay an heriot, is repugnant and bad. 21 H. 7. 13. a. 15. a.

So an avowry without alleging seisin of the services, whether it be rent-service or not, or upon the death of what tenant it is due, is bad. Bend. pl. 119.

So for an heriot upon reservation of the best beast, or 5*l.* at election, the lessor, or at least his bailiff, cannot distrain for the best beast, till a demand, or election made. D. Lit. 35.

So a distress for an heriot cannot be out of the manor. 1 Sal. 356.

The property of an heriot service is not vested in the lord till distress, or seizure. 8 H. 7. 10. b. Semb. that it was vested before, otherwise he could not seize. Pl. Com. 96. a.

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Seizure of an heriot service, due by ancient tenure may be out of the manor. Per Holt, Sho. 81.

[*]Otherwise, of an heriot reserved by deed. Sho. 81. R. cont. Lut. 1367.

Heriot service shall be extinct by unity of possession. 14 H. 4. 5. a. Bro. Heriot, 8.

So if the lord purchases parcel of the land. Co. L. 149. b. R. 8 Co. 105. 2 Brownl. 294.

So if a tenant makes a settlement upon his son in marriage, it avoids the heriot, and is not fraudulent within st. 13 El. 5. R. 2 Brownl. 187.

But by st. 13 El. 5. a feoffment, &c. or conveyance of lands, &c. of an intent to defraud, &c. of heriots, &c. as to the persons so defrauded shall be void; and the person, party to such conveyance, &c. who shall wilfully put in ure, &c. the same, shall forfeit a year's value of such lands, and the whole value of such goods, &c.

And upon this an action lies for the lord *qui tam*, &c. for all goods aliened to defeat him of his heriot, though other lords are also defeated, and the plaintiff shall recover only the value of his heriot. Semb. Dy. 351. b.

So if tenant by heriot service enfeoffs A. of part; the service, being entire, shall be multiplied, and not extinct. R. 8 Co. 106.

And if the lord afterwards purchases the part of the feoffor, the heriot service due from A. is not extinct. R. 8 Co. 106. a.

(K 22.) By action.

So for an heriot reserved upon a lease, debt lies. 2 Sand. 167. Vide post, (K 26.)

Or covenant. 2 Sand. 165. 7.

(K 28.) Heriot-custom [and compensation in lieu of.] When due.

So an heriot may be due by the custom of a manor, upon the death of every tenant of an estate of inheritance.

If he dies his tenant, though he does not die seised. Kit. 134. a. Bro. Heriot, 1.

So upon the determination of an estate for life, though the estate has not continuance afterwards. 21 H. 7. 15. b. Kel. 80. Kit. 133. Bro. Heriot, 5.

Or upon the determination of an estate for years. Kel. 80. 21 H. 7. 15.

Or at will. 2 Bul. 196.

So by custom, it may be due upon the surrender, or alienation of the tenant. Adm. 3 H. 6. 45. b. Kit. 134. b.

So by custom, it may be due upon death of the head of a body politic. D. Long. 5 Ed. 4. 72. b.

So it may be upon the death of some tenants, though not upon the death of others within the same manor. Kit. 134. b.

So if a man dies tenant of several heriotable tenements, he shall pay several heriots. Kit. 134. a.

And if a tenant enfeoffs several parts of heriotable lands, each shall pay an heriot; for they shall be multiplied. 6 Co. 1. a.

If land escheats, &c. and afterwards is re-granted, yet an heriot shall be due upon death; for heriot custom is not extinct by unity of possession.

[*]14 H. 4. 5. a. Per Hussy, 8 H. 7. 11. a. But the reporter makes a *quare*. Per two J. acc. 2 Brownl. 295, 6.

If a tenant surrenders to another, and dies before the surrender is presented, an heriot shall be due. Kit. 185. a.

So, if a copyholder be disseised, and dies before re-entry ; for he is tenant in right. Per Berkly, 2 Rol. 72. l. 35.

So, if a tenant enfeoffs the lord of part of heriotable land ; the heriot-custom shall not be extinct. 8 Co. 106. b. 2 Brownl. 295, 6.

And an heriot shall be paid before a mortuary. Co. L. 185. b.

And, though a testator devises all his goods. Ibid.

So by custom so much money may be due, *loco heriotti*, and not a beast. Kit. 103. a.

[It seems that a custom for the homage to assess a compensation in lieu of a heriot, to be paid by an in-coming copyholder on surrender or alienation is not good. 1 Bos. & Pull. 282.]

[If the lord set up a custom to have the best live or dead chattel as a heriot, *quare*, if the tenant can modify that custom by pleading another, that the homage shall assess a compensation in lieu of the heriot? Ibid.] (h)

Or the best chattel.

(K 24.) When not.

But if an heriot be due upon the death of every tenant, and the land be granted to joint-tenants, no heriots shall be paid upon the death of one, till the deaths of all the joint-tenants, without a special custom ; for all are but one tenant. 24 Ed. 3. 72. b. Tr. 25 Ed. 3. pl. 3. Bro. Heriot, 4. Fitz. Heriot, 3. 5.

So, if a feme-covert dies tenant of heriotable land, no heriot shall be paid ; for she has no goods. [4 Leon. 239. Kelw. 84.]

So where by custom a corporation pays an heriot upon the death of the head, if a prior has such land and dies, he shall not pay an heriot ; for he has no goods. Kit. 134. a.

So a custom to pay an heriot upon the death of every stranger who dies within the manor is not good. 4 Mod. 321. Dy. 71. b. in marg. R. Cro. El. 725.

[An heriot is not payable on the death of a tenant by the curtesy. Kelw. 84. b. 14 Vin. 296.]

(K 25.) How it shall be recovered.—By seizure.

By the death of the tenant the property of an heriot-custom is vested in the lord immediately. Vide ante, (K 20.)

And therefore the lord may seize an heriot-custom, but not distrain for it. Per two J. 8 H. 7. 10. b. 27 Ass. 24. Per cur. Kel. 167. Bl. Com. 96. a.

And he may seize in any place. Kel. 82. a. 84. b. Per Holt, Sho. 81. 1 Sal. 356.

But he cannot seize the beast of another. 3 H. 6. 45. b. Cro. Car. 260.

(h) Evidence that the homage have been accustomed to assess a certain sum of money as a heriot upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in kind upon alienation. Ibid. 393.

[*]And a custom to take the best beast of another upon the land, if the heriot be eloigned, is void. R. Dy. 199. b. 2 Brownl. 90. R. Mo. 16. Bend. pl. 147. 294.

So, if the lord seizes the worst beast for the best, he must be content with his election, and cannot afterwards seize another. Bro. Heriot, 11, Hob. 60.

(K 26.) By action.

So, if an heriot be eloigned that the lord cannot seize, he may have detinue against him who detains it; for the property was immediately in him. Bro. Heriot, 6. 9. Vide ante, (K 22.)

But he cannot distrain for an heriot custom; for the property being in him, a prescription to distrain for his own goods, is not good. Bro. Heriot, 2. 6, 7.

So he cannot prescribe, that every tenant ought to pay an heriot after his death, but, that after a death he ought to have, &c. R. 21 H. 7. 13, a. 15.

(K 27.) To what lord it shall be paid.

If the lord grants the freehold of his copyholds, or of a particular copyhold in fee, or for years; the heriot shall be paid (if the land be heriotable) to the grantee. Vide ante, (B 2.)

But if the grant be of the freehold to A. for the life of the copyholder, and afterwards to the copyholder himself for years, who assigns the term, and then dies; the heriot shall not be paid to the assignee, for he was not lord at the time when it happened. R. 2. Rol. 72. l. 20.

In replevin or trespass, if defendant avows or justifies for heriot service, he ought to allege seisin of the land, of whom the manor is held, and by what services. 8 Co. 103. Vide Pleader, (3 K 15.)

So for heriot custom, he ought to allege seisin, custom, death, and seizure of the heriot. Lut. 1310. Vide Pleader, (3 K 28.)

And it is not sufficient to allege a custom to take the best beast, without saying, *pro herioto, vel, nomine heriote*. Dy. 199. b.

So the seizure ought to be alleged, *pro herioto, vel, nomine heriote*. Dy. 199. b. Semb. cont. where the omission was shewn or cause of demurrer, yet the plea was held good. Win. Ent. 63.

(L) COPYHOLD, HOW DESTROYED.

If a copyholder takes a feoffment from the lord of his customary land, the copyhold is destroyed. 4 Co. 31. French.

So, if he takes a lease for life, or for years, the copyhold is destroyed for ever. R. 4 Co. 31. French. Vide ante, (B 3.) Semb. Latch, 213.

Though the lease was by parol. 4 Co. 31. 1 Rol. 498. l. 50.

So, if the lord makes a lease of customary land, and the lessee assigns his term to the copyholder, the copyhold is destroyed for ever. R. 2 Cro. 17. a. 1 Rol. 510. l. 30. R. Mo. 185. 1 Leo. 170.

So, if the lord lease a copyhold for half a year, or any time certain. 1 Rol. 498. l. 50. Vide ante, (B 3.)

So, if he makes a feoffment, lease for life, &c. of a copyhold. 1 Ver. 458. Vide ante, (B 3.)

[*] Though he enters for a condition broken, the feoffment being upon condition. R. 4 Co. 31.

So, if the king grants a lease of land demised by copy, and afterwards grants the reversion to another in fee, and the lessee assigns to the copyholder, the copyhold is destroyed. R. 1 And. 191.

So, if tenant in tail of a copyhold, remainder to him in fee, purchases the freehold, and then makes a bargain and sale to A. the issue in tail shall not avoid it. R. 1 Ver. 393. [3 P. W. 9.]

[So also, it seems, if the remainder in fee be in another, and the tenant in tail purchase the freehold and die without issue, the remainder-man shall not be entitled to the copyhold. Semb. 3 P. W. 10. in the notes.]

So, if a copyholder takes a lease of a manor, his copyhold is extinct; but it may afterwards be re-granted by copy. Vide ante, (B 3.) R. 4 Co. 31. b. Cont. per Shute, Sav. 70.

So, if a copyholder sues execution upon a statute, and has the manor in execution, his copyhold is gone. Cont. per Manwood, who says, that after the debt levied, the customary interest remains. Sav. 70.

So, if a copyholder by deed sells his copyhold to the lord, his estate is extinct; but may afterwards be re-granted by copy. R. Hut. 65. Jon. 41.

Though the lord was only lessee for years of the manor. R. Hut. 65.

So, if a copyholder by deed releases his copyhold to the lord, though it be not of the nature of a release to give possession. Hut. 65. Jon. 41.

But if the lord enfeoffs his copyholder to the use of another, his copyhold is not destroyed; for it is saved by the st. 27 H. 8. 10. R. 7 Co. 39. a. Lillingston.

So, if the king grants a copyhold by patent for life, it shall not be extinct, but the king may afterwards grant it by copy. R. 2 Rol. 197. l. 5. Vide ante, (B 3.)

So, if the king afterwards grants the manor, the grantee, after the life ended, may grant it by copy. R. 2 Rol. 197. l. 20. (i)

So, if the lord grants the freehold of a copyholder to A. for the life of the copyholder, his copyhold is not destroyed. R. Hob. 181.

So, if the lord makes a new grant by copy for life, with remainder over, &c. to his copyholder in fee; the inheritance of the copyhold is not thereby destroyed. R. cont. 37. El. *ut dicitur*; but there per two J. acc. 3 Bul. 81.

And if the lord makes a bargain and sale of the inheritance of a copyhold, to a copyholder for life, who accepts it; the remainder of the copyhold is not thereby destroyed. R. 9 Co. 106, 7. M. Podger.

So, if there be a copyhold for three lives *habend' successive*, and the lord grants the inheritance to the first, the interest of the second life is not destroyed. R. 10. 72.

granted to the first life, remainder to the second life. R. 10. 72.

destroyed by grant of the inheritance, the second life shall not be destroyed. Semb. 2 Leo. 73.

the advantage till the death of the first. R. 10. 72.

a copyhold by the crown, may be presumed. 11 East, 111. R. 10. 72. R. 10. 72. R. 10. 72.

Enfranchisement of a copyhold by one having a partial interest, is for the benefit of the remainder-men, as well as his own. 1 B. C. C. 517. (*k*)

(M) COPYHOLD, HOW FORFEITED.

(M 1.) By treason or felony.

[The severity of the law in cases of forfeiture warrants the courts in Westminster-hall in taking care that there is the greatest accuracy in the lord's proceedings; and, therefore, in all cases of forfeiture, which are *strictissimi juris*, if there be any irregularity, it is sufficient to overturn the whole proceedings. Per Lord Kenyon, Ch. J. 3 T. R. 169. 173.]

If a copyholder commits high treason, his estate is forfeited to the lord, not to the king, except by the express words of an act of parliament. 2 Vent. 39. Vide post, (M 6.) Per Hale, Hard. 434.

And upon his attainder, his estate is absolutely determined; for he cannot afterwards be of the homage. 2 Jon. 190.

Nor take a surrender out of court. Ibid.

So, if a copyholder commits felony, his estate is forfeited to the lord by custom. 2 Jon. 189. Pol. 621. Skin. 8.

And a custom, that if a copyholder commits felony, upon presentment of the homage the lord shall enter, is good. R. 1 Bul. 13. 1 Leo. 1. 2 Brow. 217.

Yet if the lord grants a copyhold to A. for life, and upon his death or forfeiture to B., and A. is attainted for felony, B. shall enter; for the lord shall not have it against his own grant. R. Skin. 29.

But for treason or felony, the lord cannot seize till attainder, without a special custom allowing seizure before. Per cur. 2 Vent. 38. Semb. 1 Lev. 263.

And if the felon be acquitted upon trial, the forfeiture shall be discharged, though the felony was presented by the homage. R. Godb. 267.

So, if the copyholder has clergy, the lord cannot seize without a special custom. Semb. 1 Lev. 263.

So, if the copyholder be acquitted upon an indictment. Dub. 1 Bul. 13. 2 Brow. 220. R. Godb. 267.

So, if the husband be attainted, the wife does not forfeit her dower, which she has by custom in his copyhold. R. Hard. 434.

[A forfeiture by a copyholder's levying a fine may be waived by the lord. 3 T. R. 162.]

[A fine levied by a copyholder, who continues in possession, is void, as against the lord. Ibid.]

[No fine levied with proclamations shall bind any but those who are put out of possession, and have but a right; for if their estate or interest [*] be not divested out of them, but remains in them as it was *ab initio*, they need not make an entry or claim to that which never was divested. 5 Co. 123. 9 Co. 106.]

(M 2.) By alienation.

So, if a copyholder makes an alienation by deed, it is a forfeiture by the general law of copyholds. Lit. s. 74.

(*k*) What confirmation to the tenant of a customary and tenant-right estate, shall enfranchise it. 4 East, 271.

As, if he makes a feoffment.

If he makes a charter of feoffment, with a letter of attorney to make livery; though no livery be made. 1 Rol. 508. l. 21.

So if he makes a bargain and sale in fee, though the deed be not enrolled; for it is sufficient to determine a lease at will. 1 Rol. 508. l. 17. but there said to be R. cont. 38 Eliz.

So, if he makes a lease for life.

Or, if he makes a lease for years, not allowed by the custom, without licence. Co. L. 59. a.

What leases a copyholder may make, vide ante, (K 3.)

So, if he makes a lease not pursuant to his licence. Mo. 184. R. Cro. El. 395.

If the forfeiture be by a lease without licence, the seizure may be after the lease is determined. Per Powel, Lut. 803.

But if he makes a charter of feoffment, or deed of demise for life, without a letter of attorney to make livery, it is no forfeiture. 1 Rol. 508. l. 25. And so Co. L. 59. a. seems to be intended.

So, if he makes a release of his right to the copyholder in possession. Co. L. 59. a. Vide ante, (I 1.)

Or, if he promises to make a lease, but does not. R. 1 Bul. 190.

Or, makes a lease for a year, and covenants to make a lease afterwards *de anno in annum usq.* ten years. R. 1 Bul. 190. 2 Cro. 301.

So, if a copyholder for life surrenders to another in fee, it is not a forfeiture; for nothing passes by livery. 4 Co. 23. a. Bullock. Mo. 753.

Nor if he suffers a common recovery in the court of the manor. R. 1 Mod. 200. 2 Mod. 33.

Or, if an infant makes a lease without licence. Noy, 92. Latch, 199.

Otherwise, if he accepts the rent at full age; for his lease was not void, but voidable. Noy, 92. Latch, 192. R. Jon. 157.

(M 3.) By waste.

So, if a copyholder commits waste, it is a forfeiture, by the general custom of copyholds. 1 Rol. 508. l. 31. R. Mo. 392. R. Ow. 17.

Or, if he permits his tenement to be in decay. 1 Rol. 508. l. 34. Ow. 17.

Or, pulls down a house newly built upon the copyhold. R. 1 Bul. 51.

Or, if he cuts down trees on pretence of repairs, and permits them to be rotten. Per Clench, 1 Rol. 508. l. 52.

[If he tops timber-trees, and makes them pollards. Str. 447.]

[If he opens a new stone-quarry. Ibid.]

[If he grubbs up and destroys hedges and boundaries. Ibid.]

So, if he builds a new messuage upon the copyhold. R. 4 Leo. 241. Hut. 103. Lit. 266, 7.

[*]So, if a woman copyholder takes a husband, who does waste, it is a forfeiture. Per two J. 4 Co. 27. a. Clifton. 1 Rol. 509. l. 25.

And it is a forfeiture of the estate of the wife, though the husband dies; for waste tends to the disinherison of the lord. 1 Rol. 509. l. 40. Vide post, (M 5.)

So, it is a forfeiture, though he afterwards repairs. Dub. Lat. 227.

And by waste in one acre, or by cutting down one tree, the whole copyhold is forfeited. R. 1 Rol. 509. l. 10. Vide post, (M 5.)

But if a copyholder holds several copyholds by several tenures; waste in [*207]

one is a forfeiture only of one entire copyhold, though they are all granted by the same copy. R. 4 Co. 27. a. Cro. El. 353.

So, if all escheat, and are re-granted *tenend^r per antiqua servitia*; waste afterwards in one is a forfeiture of that only. R. 4 Co. 27. a. 3 Leo. 109.

But if a copyholder cuts down timber for repairs, it is no forfeiture; for he may do so without a special custom. Per three J. Cro. El. 498. 1 Rol. 508. l. 40. Mo. 392.

Though he cuts down more than he wants at present, and keeps the residue for future use; for he may not know precisely how much is necessary. 1 Rol. 508. l. 45. Cro. El. 499. Mo. 393.

So, it is no forfeiture, if he sells the top and bark, when he cuts down timber for repairs. R. 3 Bul. 282.

Or, if he cuts down trees which the lord grants to him. D. Mo. 94.

So, it is no forfeiture, if a copyholder, who by custom may cut timber, does waste. 3 Bul. 81. Cro. Car. 221.

When custom allows a copyholder to cut down trees. Vide ante, (K 7.)

So, it is no waste for a copyholder in fee to dig, or open mines, in his soil. Semb. 1 Sid. 152. (Vide 1 P. W. 406.)

So, it is no forfeiture, if a stranger commits waste without the assent of the copyholder. Per two J. 4 Co. 27. 1 Rol. 508. l. 37. D. cont. Mo. 49. Acc. 4 Leo. 241. D. acc. 1 Bul. 52. R. cont. and agreed to be settled. Lut. 802.

Or, one who occupies with sufferance of the copyholder. D. cont. Mo. 49. Dal. 49.

So, though waste be done, chancery will relieve against the forfeiture, upon satisfaction for it, if there was no intention to commit waste. R. Ca. Ch. 96. 2 Ver. 664. Vide Chancery, (2 V).

As, if timber cut down was not used. Ca. Ch. 96.

Or, was used for the repair of another copyhold. Ca. Ch. 96. R. 2 Ver. 537.

Otherwise, if there was full and evident intention to commit waste. Ca. Ch. 96.

(M 4.) By denying services, fines, &c.

So, if a copyholder refuses his rent, or services, it is a forfeiture. 1 Rol. 506. l. 49. Dy. 211. b. in marg.

As, if he refuses his rent at the day. Hob. 135. 1 Rol. 506. l. 36.

So, if he refuses suit at the court of the lord, upon sufficient summons. R. 1 Rol. 506. l. 50. 3 Bul. 80. 268. R. 3 Leo. 108. R. 1 Rol. 429.

[*]So, if he does it not, upon frequent demands, though he does not positively refuse. Vide Latch, 14.

So, if he refuses to pay a fine evidently reasonable, upon demand. 1 Rol. 507. l. 20. Vide ante, (H 7.)

So, if he says that he is not ready to pay his rent, and the lord assigns a day certain, within the manor, for payment, and he does not pay it; it is a forfeiture, for it amounts to an absolute refusal. R. Latch, 122.

Though the place assigned for payment be not at the next court, but at some other place within the manor. R. Latch, 122.

But it ought to be within the manor. Ibid.

And it ought to be an absolute refusal; for if the copyholder says, that he cannot pay his rent immediately, it is no forfeiture. R. 1 Rol. 506. l. 45. Cro. El. 505. D. Ray. 42. Co. Ent. 647. d.

tate of his wife also ; for it tends to the disinherison of the lord. 1 Rol. 509. l. 40. Vide ante, (M 3.)

So, if he refuses his rent or services. D. Cro. El. 149. D. 2 Rol. 344.

Though the husband dies before the entry of the lord. Cont. per Dodd. 2 Rol. 344.

So, if the husband commits felony, the free-bench or dower of his wife shall be forfeited, if it be not preserved by special custom. Win. Ent.

So, if a copyhold be granted to two for life *successive*, and the first commits waste, the whole estate is forfeited. R. Mo. 49. D. Dal. 49.

If a custom be, that the copyhold of a copyholder convicted of felony shall be forfeited ; and the wife is admitted to the copyhold as her free-bench, and during her life the heir is convicted, his estate shall be forfeited. R. 1 Leo. 1.

[If A. devises copyhold to B. and surrenders to the use of his will, and B. is hanged for felony before admittance, or doing any act to shew he was tenant, the lands are not forfeited to the lord, but descend to the heir of A. Roe v. Hicks, P. 27 G. 2. 2 Wils. 13. 16.]

(M 6.) Who shall have advantage of the forfeiture, and how it is to be taken advantage of.

Dominus pro tempore shall take advantage of a forfeiture. R. 1 Rol. 509. l. 50. [And no other lord. 3 Term Rep. 173. except only in those cases where the act of forfeiture destroys the estate. Id. ibid.]

So, the grantee of the inheritance of a copyhold. R. 1 Rol. 510. l. 3. Mo. 399. 3. Cro. El. 492. Vide Ow. 63. Semb. cont.

So, lessee for years of such a grantee. R. 1 Rol. 510. l. 5. Dub. Cro. El. 499. Mo. 393.

[*]So, if the lord dies after forfeiture for waste, the heir shall take advantage of it. Dub. Latch, 227. Cont. per three J. Powel acc. Lut. 802.

So, a lessee of a manor by lease made after a forfeiture committed shall take advantage of it. R. 1 Rol. 510. l. 10. Cro. Car. 234. But there the copyholder surrendered to the lord, not having notice of the forfeiture, who entered and made a lease, and by the entry the lord was in his elder right.

So, the alienee of a manor, after a forfeiture committed. Dub. 2 Vent. 39.

But if the lord dies after a forfeiture committed, he in reversion, or remainder, shall not take advantage of it. R. 2 Cro. 301. 1 Bul. 190.

And for any forfeiture that does not determine the customary estate, the heir shall not take advantage. R. per three J. Lut. 802.

As, for waste. Lut. 802. Dub. Latch, 227.

By a lease without licence. Lut. 802. 1 Sal. 187.

So, if two parceners be ladies, and one dies, the other being heir to her sister, shall not take advantage ; for she cannot enter for a moiety. R. per three J. Lut. 802. 1 Sal. 187.

And upon forfeiture for treason, the lord shall take advantage, not the king, unless by the express words of an act of parliament. 2 Vent. 39. Vide ante, (M 1.)

If a copyholder for life forscits, the lord shall take advantage, not he in remainder. 1 Rol. 500. l. 45. R. 9 Co. 107. a. M. Podger. 1 Sand. 151. R. 1 Mod. 200. 2 Mod. 33.

Except when the remainder is to commence after forfeiture, &c. R. 2 [*211]

Jon. 189. 3 Lev. 94. But there it was not a remainder but a reversion. Pol. 620. Vide infra. Vide post, (M 7.)

But if a surrender be to A. and B. and the heirs of A., but B. upon three proclamations, according to the custom, does not come to be admitted, A. shall be admitted to the whole, and not the lord to a moiety. Dub. Yel. 1.

So, if a reversion of a copyhold be granted *habend'* after the death, surrender, or forfeiture of the copyholder for life; if he forfeits, the reversioner shall take advantage, and not the lord. R. 3 Lev. 94. Pol. 621. 2 Jon. 189.

So, if a forfeiture be such, that it determines the customary estate, the heir shall take advantage of it; as if a copyholder makes a feoffment, or lease for life. R. Lut. 803.

(M 7.) When a presentment is not necessary.

If a copyholder commits a forfeiture, by treason or felony, after attainder, the lord may seize without presentment by the homage. R. 2 Vent. 38. 2 Jon. 190.

Or, by alienation. Kit. 90. b. R. Cro. El. 499.

Or, by waste. Cont. Kit. 90. b. Semb. acc. Latch, 227. R. Cro. El. 499.

Or, by a lease without licence. R. Jon. 249.

So, the lord may grant a copyhold forfeited, before seizure; for [*]the forfeiture is a determination of the will, of which the lord may take advantage. R. 1 Lev. 26.

So, a grantee *habendum* after forfeiture, &c. may enter, before seizure, upon an attainder of the copyholder. Semb. 2 Jon. 189. R. 3 Lev. 94.

But for a forfeiture by non-feasance, the lord cannot seize without a presentment of the homage; as for not rendering services, or suit of court, Kit. 90. b.

Nor for any personal forfeiture. R. 4 Leo, 241.

(M 8.) Dispensation; what shall be.

If the lord makes an admittance to the copyholder, after a forfeiture committed, it amounts to a dispensation; for it shall be taken as an entry, and a new grant. R. 1 Lev. 26. [Vide 3 Term Rep. 171. where it is said by Ld. Kenyon, that the word "dispenses" shews that he does not make a new grant, but admits the tenant to be in of his old title.]

So, if he accepts rent of the copyholder. Per Twisd. 1 Keb. 15. Vide condition, (P) (l)

So if a copyholder be amerced at the court for not coming; it will be a dispensation of the forfeiture. R. 1 Leo. 104.

[So if after a forfeiture committed, which may be waved, the lord do any solemn acts to shew that he waves it, as if he admit a presentment that the tenant forfeiting died seised, and require, by proclamation, his heir to come in. 3 Term Rep. 471.]

[So if he do not avail himself of his right to seize, within twenty years. Semb. *sed quær.* Id. 172. 273.]

(l) 1. So a presentment of the death of a copyholder, and a proclamation requiring his heir to come in and be admitted, is a dispensation. 3 T. R. 171.—2. And any other acts equally solemn will amount to a dispensation. Ibid. ,

Though the amerciamment be not estreated or levied. 1 Leo. 104.

If permissive waste be repaired before entry, it prevents the seizure, as forfeited. R. Powel, Lut. 803.

And a dispensation by him who is the rightful lord, though he be only *dominus pro tempore*, binds him in reversion, as well as himself. R. 1 Lev. 26.

But an admittance after a forfeiture by a disseisor, is not a dispensation, as to him who has the right. R. 1 Lev. 26.

So it shall be no dispensation, if the lord had not notice; as if he accepts rent of a copyholder after waste done, without notice of it, he may afterwards enter for a forfeiture. R. 1 Rol. 475. l. 50.

So if the lord accepts a surrender of the copyholder, after treason committed. R. 2 Vent. 33.

So a pardon of treason, is no dispensation. R. 3 Lev. 94. R. 2 Jon. 189.

So if the lord accepts a surrender of a copyhold after a forfeiture committed, and before notice of it, it is no dispensation. R. Cro. Car. 234.

Yet the lord ought to take notice of a forfeiture, by denial of suit of court. 2 Vent. 39.

Or non-payment of rent. D. 2 Vent. 39.

[*](N) COPYHOLD; WHEN BOUND BY A STATUTE.

When no prejudice ensues to the lord by it, copyholds are included within the general words in any statute, viz. lands, tenements, and hereditaments. 3 Lev. 327. R. 3 Co. 8. D. Cro. Car. 43, 44. Sav. 67.

As the st. of Merton, 20 H. 3. by which damages are given to the wife for being deforced of her dower, when her husband dies seised, extends to copyholds. Cro. Car. 43. Vide ante, (K 2.)

So the st. W. 2. 13 Ed. 1. 3. which gives a *cul in vita* upon alienation by the husband of the land of his wife. Cro. Car. 43. 3 Co. 9. a. Dal. 116.

So the other branch of W. 2, 3. which gives receipt to the wife, upon default of her husband, extends to the default of the husband in a writ of right, in a court-baron. 2 Inst. 343. 3 Co. 9. a. Cro. Car. 43.

So the st. W. 2. 4. which gives a *quod ei deforceat* upon a recovery by default against tenant for life, &c. 3 Co. 9. a. Cro. Car. 43.

So the st. 4 H. 7. 24. whereby a fine, with proclamations and non-claim for five years, bars all estates, &c. extends to a customary interest. R. 9 Co. 105. 1 Brow. 181, 2 Inst. 517.

And therefore, if the lord enfeoffs a copyholder in tail, who afterwards levies a fine *sur conusance*, &c. the issue in tail is barred. R. Cart. 23.

But if the lord makes a bargain and sale to a copyholder for life, who afterwards levies a fine *sur conusance*, &c. and five years pass, he in remainder is not barred by the st. 4 H. 7. 24. for the remainder was not divested. R. 9 Co. 106. Vide ante, (L—M 5.)

So copyholder for three lives *successive*, the first life joins with the lord in a fine *come ceo*, &c. of the copyhold estate; it does not bar the second life. R. 2 Jon. 143. Ray. 403. Pol. 564.

So the st. 31 H. 8. 13. which avoids leases for life made by religious persons within a year before, extends to copyholds. R. 3 Co. 8. Mo. 128. Sav. 66.

So, the st. 32 H. 8. 9. against champerty and maintenance in the purchase of titles, &c. Per Wray, 4 Co. 26. a. Cro. Car. 43. 2 Brown. 79.

And the st. 32 H. 8. 34. which gives to a grantee of the reversion, the same actions and entry for a condition broken, as the grantor might have, extends to the assignee of a reversion of a copyhold. Cont. R. 2 Cro. 505. Yel. 223. Per Hob. 178. Dub. Cro. Car. 25. D. Cro. Car. 44. but R. acc. 3 Lev. 327. Vide ante, (K 12.)

So the st. 32 H. 8. 2. of limitations. Mo. 411.

So the st. 13 El. 20., which restrains long leases made by ecclesiastical persons. 3 Lev. 327.

So the st. 27 El. 4., which restrains fraudulent conveyances. 3 Lev. 327. [Vide Cowp. 710. 713, 714.]

So the st. 1 Jac. 15. & 21 Jac. 19. against bankrupts; for being named by the st. 13 El. 7. the other statutes, made in aid and confirmation of this, extends to copyholds. R. Cro. Car. 550. Adm. Cro. Car. 568.

[¹]By the st. 13 El. 7. commissioners may take order with bankrupt's lands, &c. as well customary as free, &c. And by deed indented and inrolled make sale of such lands, &c. But the vendee shall not enter, nor take the profits till he hath agreed with the lord for his fine, who thereupon shall admit him.

But the estate of a copyholder is vested in the bargainee by the bargain and sale. Cro. Car. 569. Vide ante, (G 1.)

And he shall avoid all mesne acts between the sale and his admittance; as, if the bankrupt dies after sale, and before admittance of the vendee, the wife of the bankrupt shall not have her dower. R. Cro. Car. 569. Vide ante, (G 1.)

So the st. W. 2. 13 Ed. 1. *de donis*, extends to copyholds. R. 3 Co. 8. R. 9 Co. 105. cont. D. cont. Sav. 67. Vide ante, (C 8.) But it was R. acc. 3 Lev. 327. Cont. 1 Rol. 838. l. 15. Semb. acc. 1 Leo. 175. Dub. Cro. El. 380. Adm. 1 Sid. 314.

(O) WHEN NOT.

But when a statute alters the service, tenure, custom, or interest of the land, to the prejudice of the lord, the general words of the statute do not extend to a copyhold. R. 3 Co. 9. a. D. Cro. Car. 44.

And therefore, a copyhold is not extendible upon a stat. merchant or staple within the st. of Acton Burnel, 11 Ed. 1. *De Mercat.* 13 Ed. 1. Mo. 94. 128.

Nor by the st. W. 2. 13 Ed. 1. 18. which gives an *elegit*. R. 3 Co. 9. a. Cro. Car. 44. Sav. 67.

So, the st. of Gloucester, 6 Ed. 1. which gives summons *ad warrantizandum* upon a foreign voucher, does not extend to copyholds. 2 Inst. 325.

Nor the st. 23 H. 8. 5. which gives authority to commissioners of sewers to sell lands. Cal. 134, 5. (Callis, Seward's edit. 1686.)

Nor the st. 27 H. 8. 10. which transfers the possession to the use; for it will be a prejudice to the lord to have the possession transferred by the statute without the allowance of the lord. D. Cro. Car. 44.

Nor the clause which enables to make a jointure of lands.

Nor the st. 31 H. 8. 1. nor the st. 32 H. 8. 32. which compels joint-tenants and tenants in common to make partition. Cro. Car. 44.

Nor the st. 32 H. 8. 28. which enables tenants in tail, and husband and wife, to make leases for twenty-one years. Cro. Car. 44. Dal. 116.

Nor the st. 32 H. 8. 37. which gives remedy to executors or administra-

tors for rent-arrear, by distress, or action of debt. R. Yel. 135. Vide ante, (K 12.)

Nor the st. 29 El. 6. which gives to the king the lands of recusants. R. 1 Leo. 98. Ow. 37. D. Hard. 433.

Nor the st. 31 El. 7. which prohibits the erection of cottages without four acres of land. R. 1 Bul. 52.

Nor the st. 12 Car. 2. 24. which enables the father to dispose of the guardianship of his son. R. 3 Lev. 395. Lut. 1190. Vide ante, (K 5.)

[*](P) COPYHOLDER, HOW IMPLEADED.

(P 1.) In the lord's court.

A copyholder shall not implead, nor be impleaded for his tenements by the king's writ. Lit. s. 76.

And therefore, if he implead another for his tenements, he shall have a plaint in the lord's court, and make protestation to sue in the nature of an assize of *novel disseisin*, of an assize of *mortdancestor*, of a *formedon*, or other action at common law. Lit. s. 76. F. N. B. 12. B.

So in nature of a writ of right. 3 Leo. 99.

And if an erroneous judgment be given, a copyholder shall not have a writ of false judgment, in respect of the baseness of his estate; but he ought to sue to the lord by petition. Co. L. 60. a. F. N. B. 12. B. D. 4 Co. 30. b. Ca. Parl. 67. Mo. 69.

So if he be distrained for more customs or services than he ought, he shall not have a *monstraverunt*. F. N. B. 14. D. 16. E.

So if a copyholder surrenders to A. upon trust, and the trust be not performed; he may sue to the lord by petition, and compel performance of the trust. R. 1 Leo. 2.

And if the lord decrees a surrender to A., and the party refuses, the lord may seize, and admit A. R. 1 Leo. 2.

(P 2.) In chancery.

But if the lord refuses admittance to the heir or surrenderee, the copyholder may sue in chancery, and shall be there relieved. 2 Cro. 368. Vide ante, (G 10.)

So if the lord ousts his tenant without cause.

So if he ousts his copyholder for an involuntary forfeiture. Ca. Ch. 96. Vide ante, (M 3.)

So if he demands an excessive fine. Ch. R. 464.

Or more services than he ought.

So if the lord refuses to hold a court to do right to his copyholder. Adm. Ca. Parl. 67. Vide ante, (C 9.)

Or refuses to do right, upon a petition to him after an erroneous judgment. Adm. Ca. Parl. 67. 4 Co. 30. b. [Vid. 1 P. W. 330.]

Or refuses to grant licence to make leases.

So if a copyhold be surrendered to B. for payment of an annuity, or other trust, chancery will compel the performance.

So if an erroneous judgment be in a customary court, in an action in the nature of a *formedon*; chancery upon a bill in the nature of false judgment will reverse it. R. 1 Rol. 373. l. 45. Lane, 98.

So the exchequer; if it be in the king's manor. R. 1 Rol. 539, l. 20. Lane, 98.

So chancery will ascertain the customs of a manor between the lord and his tenants.

And ascertain the limits of copyhold and freehold tenements, which are confused.

So chancery will relieve against a defective surrender. Ca. Ch. 171. Vide ante, (F 10.)

If the surrender be not presented. Ca. Ch. 171.

If a copyhold is agreed to be enfranchised, and the freehold is conveyed [*] to a trustee without a surrender of the copyhold to him. R. 1 Ver. 392.

If a surrender be made into the hands of one, and not of two copyholders. 2 Ver. 164.

So if a surrender be refused. 2 Ver. 585.

So a devise or settlement of a trust of a copyhold shall be good without a surrender. 2 Ver. 585. 704.

So chancery will supply the default of a surrender to the use of a will, when the rolls are lost, and long possession has been under the will. R. 2 Ca. Ch. 151. 1 Ver. 195. Vide Chancery, (2 V.)

So in favour of a purchaser. 2 Ver. 163.

Or for the provision of a younger son or daughter. 1 Sal. 187.

Though he has some other maintenance. Ibid.

Otherwise, if the eldest son be thereby disinherited. Ibid.

Or it was for the provision of a grandson. R. in Parl. 1 Sal. 187. 2 Ver. 625. (Vide 1 P. W. 61.)

Or for the provision of a nephew. R. 2 Ver. 625.

So it will supply it for the heir, when the copyhold was gavelkind, and charged with legacies to the younger children. R. 2 Ver. 165.

But chancery will not relieve the lord of a manor, after a sale of the manor, for rents or fines due before the sale. R. 1 Rol. 374. l. 45.

Nor will compel the lord of a manor to receive a petition to reverse a common recovery. R. Ca. Parl. 68.

Vide Chancery, (2 V.)

(P 3.) At common law.

So, a copyholder shall have trespass by the common law, for a trespass done upon his copyhold. Per Danby, 7 Ed. 4. 19. a. 2 H. 4. 12. a.

And shall have it against his lord, if he enters upon him without cause. Per Danby, 7 Ed. 4. 19. Per Brian, 21 Ed. 4. 80. Co. L. 60. b.

Or, if he cuts down trees, not being timber. R. 1 Leo. 272.

So an action upon the case lies against the lord, if he cuts down timber, when by the custom it belongs to the copyholder. Vide ante, (K 7.)

So the lessee of a copyholder shall maintain an ejectment at common law. R. 4 Co. 26. Melwich. D. Mo. 128. 272. R. Mo. 539. 569. Per three J. cont. Cro. El. 483. 717. R. acc. Cro. El. 224. 1 Leo. 328. Cro. El. 535.

Otherwise, if the lessee has not a rightful estate; as, if the lease be for several years without licence, he shall not have an ejectment against the lord. D. Lit. 234.

Nor against a stranger. Dub. Lit. 234.

So, if a man ousts a copyholder of a manor in the king's hands, he cannot maintain an ejectment. R. 3 Leo. 221.

So a copyholder cannot maintain ejectment upon the demise of the lord by copy. Cro. El. 224. 1 Leo. 328.

So, if a replèvin be upon a distress for rent of a copyhold, the defendant may avow for it in the king's court. R. Cro. El. 524.

So, an *ejectione custodiæ* lies for a guardian, appointed by the lord of the manor according to the custom; for he does not claim by copy, but has an interest at common law. R. Cro. El. 224. 1 Leo. 328.

[*](P 4.) Pleading of copyhold.

If a man entitles himself to a copyhold, he ought in pleading to shew a grant by the lord to him. Cro. Car. 190. Vide Pleader, (E 19.)

So, if he entitles himself under A., he ought to shew a grant to A. R. 2 Cro. 103. R. Cro. Car. 190.

But it is only form, and aided upon a general demurrer. Per three J. Cro. Car. 190. Semb. cont. 2 Cro. 103.

And if he entitles himself to the reversion after the death of A., it is sufficient to shew a grant of the reversion, without shewing a grant of the estate to A. R. 2 Cro. 52.

It is not sufficient to plead that the tenements are granted by copy, without saying, *ad voluntatem domini*. Lut. 1166. 1171. R. Lut. 126. Semb. Cro. Car. 229.

[Copyhold must be stated, or found, or pleaded to have been demisable by copy of court-roll time out of mind, or it will not be adjudged copyhold. 2 Wils. 125.]

So he cannot plead, that they are copyhold, and descendible to the heir; for that is a contradiction. R. upon a special demurrer, Lut. 1328.

That A. was seised in fee *secundum consuetudinem manerii*, without saying by copy or the like. R. 3 Bul. 230.

But the omission of, *ad voluntatem domini*, shall be aided after verdict. R. 1 Sal. 365.(m)

So it is not sufficient to plead, that the land is demisable time whereof, &c. without saying in fee, or for life, &c. Sav. 131.

That the copyhold was granted by the steward, without naming him. Sav. 131.

The form of pleading an admittance to a copyhold. Vide Co. Ent. 575. b.

Of a surrender and admittance thereupon. Co. Ent. 645. d.

Of a surrender by an husband and wife. 3 Lev. 147. Co. Ent. 576. b.

Of a surrender to the use of a will. Lut. 759. 794.

To two tenants. 3 Lev. 128. Co. Ent. 575. b.

By attorney. Lut. 760.

To the lord out of the manor. Lut. 677.

Of a grant and admittance to a reversion. Co. Ent. 184, 185.

If a copyholder claims common, or other profit, in *alieno solo*, he ought to prescribe in the name of the lord. R. 4 Co. 31. b. Foiston. Cro. El. 390. Mo. 461. Lut. 1327. 1 Sal. 170.

But if he claims it within the manor, he ought to allege it by way of a custom; for he cannot prescribe in himself, for the baseness of his estate. R. 4 Co. 31. b. Cro. El. 390. Mo. 461. Lut. 1326. R. 6 Co. 60. b.

And therefore, if he alleges a custom within his manor, *quod quilibet te-*

(m) Copyholds cannot be stated to be held of the manor to which they belong; for they are parcel of such manor; and a thing cannot be held of that whereof it is a part. Ld. Rd. 43.

ens customar' of such a tenement shall have common of estovers in another manor, it is bad. R. Dy. 363. b. 4 Co. 31. b.

[*] But if a copyholder pleads a lease, it is not necessary to plead a custom; for it shall be intended pursuant to the custom, if the contrary be not shown on the other side. D. 1 Leo. 100.

So he may plead a demise for a year, without a licence. Co. Ent. 576. a. Win. Ent. 998.

But a demise for several years shall be pleaded with a licence. Co. Ent. 185. a.

If a copyholder alleges a custom, it is more proper to say positively, *quod infra manerium talis habet' consuetudo*, &c. Semb. Lut. 1188, 9.

Yet it is sufficient to say, *eo quod secundum consuetudinem*, &c. R. Lut. 1190.

Or, *quod cum per consuetudinem manerii habere debeat*. R. 1 Sal. 365. after a verdict.

If a copyholder alleges a custom within the manor for common, &c. it is not necessary to say, what estate they have in their tenements; for be it for life, for years, or in fee, the common, &c. belongs to them for the time. R. 2 Saund. 326.

So, it is not necessary to say, that the common belongs *ad statum customarium*; for, *ad tenementa sua prædicta spectant*, is sufficient. R. 1 Sal. 366.

(Q) MANOR.

(Q 1.) What shall be.

All copyholds, regularly, are parcel of a manor. Vide ante, (B 2.)

A manor commenced, where the king granted lands with jurisdiction to another, who before the st. *quia emptores terrarum* granted parcel of them to others, to hold of him by certain services. Co. L. 58.

Every manor consists of demesnes and services.

[To constitute a manor it is necessary not only that there should be two freeholders within the manor, but two freeholders holding of the manor subject to escheats. 3 T. R. 447.]

[To constitute a court-baron, it must be holden before two freeholders at least. 4 T. R. 443. Infra, (Q 5.)]

If parceners make partition of a manor, and parcel of the demesnes and services are allotted to one, and parcel to the other; each has a manor. 2 Rol. 122. l. 15.

And if, by descent, the part of one comes to the other, it shall be one manor again. 2 Rol. 122. l. 25.

So, if a manor extends to A. and B., and he grants the demesnes and services in A. The grantee has a manor, and the grantor has another manor in B. Per two J. Cro. El. 19. Per two J. Periam cont. Cro. El. 39. Ow. 138.

So, a manor may be parcel of another manor, and held of it. 1 Bul. 54.

So, it may be held of another, by copy. Vide ante, (C 1.)

[*](Q 2.) What is parcel of a manor. (n)

The demesnes are parcel of a manor.

So, rents and services. 2 Rol. 120.

(n) None other than copyhold lands can be parcel of a manor. Ld. R. 1225.
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So, a rent-seck may be parcel of a manor ; for it may have a lawful commencement, by release from the lord to the tenant, reserving the rent, or by purchase of the tenancy by the lord paramount. 2 Rol. 120. l. 25.

So, rent for owelty of partition. 2 Rol. 120. l. 30.

If a man makes a gift in tail, or a lease for life or years, of part of the demesnes of a manor, the reversion continues parcel of the manor. Co. L. 324. b. Win. 46. R. Cro. Car. 308.

So, if he leases all the demesnes for life, or years, rendering rent ; the reversion is parcel of the manor. 2 Rol. 120. l. 50.

So, if he grants an advowson, &c. for life ; the reversion continues parcel of the manor. 2 Rol. 121. l. 2.

If husband and wife join in a lease for life of part of the wife's manor, the reversion continues parcel, for the wife's joining prevents a discontinuance. 2 Rol. 120. l. 45.

If a bishop makes a lease for life, not warranted by statute ; the reversion is parcel of the manor, for the lease makes no discontinuance. R. 2 Rol. 121. l. 25.

So, if the lord leases the whole manor for years, except one acre ; this is parcel of the manor. Co. L. 325. a. R. 5 Co. 11. b. Cro. El. 522. Dub. Pl. Com. 104.

So, if he leases an acre for years, and afterwards leases the whole manor for several years ; this acre passes as parcel without attornment of the lessee. 2 Rol. 121. l. 15.

So if parceners continue a residue of the manor in parcenary, but divide part of the demesnes ; they continue parcel of the manor. Sav. 113.

(Q 3.) What is not a manor.

But a manor cannot begin at this day. 2 Rol. 120. l. 10. Cro. El. 39.

And therefore, if a man makes gifts in tail, &c. rendering rent, and suit at court, it shall not be a manor ; for he cannot make a court, though the tenure is good. 2 Rol. 120. l. 15.

If the king grants, rendering rent, *tenend.* of his manor of G., the services are not parcel of his manor. Cro. El. 39.

(Q 4.) What is a severance of a manor.

So, land held in fee of a manor is not parcel of a manor, but the rent and services only. 2 Rol. 120. C.

So, an annuity cannot be parcel of a manor. 2 Rol. 120. l. 20.

Nor a rent-charge. Cro. El. 150. b.

So, if the lord makes a gift in tail, or leases the manor for life, saving one acre, this being severed from the freehold does not remain parcel of the manor. Cro. El. 325. a. 5 Co. 11. b.

[*]So, if he leases the manor for life, except the advowson, &c. it is not parcel of the manor. 2 Rol. 121. l. 5. 5 Co. 11. b. (o)

So, if husband and wife seised of the wife's manor make a lease of part for life, and afterwards grant the reversion to the lessee, it will be severed from the manor. 2 Rol. 121. l. 10.

So, if tenant in tail makes a lease for life of a tenement, part of his manor,

(o) 1. If a manor be granted, reserving the waste, these are thereby severed from the manor ; subject, however, to the rights of common, &c. as before. 2 T. R. 415.—2. A fine by tenant for life of parcel of a manor, the residue being in possession of the tenant in fee, severs from the manor. 8 East, 552.

not warranted by the statute ; it is severed from the manor, for it makes a discontinuance. R. 2 Rol. 121. l. 35. Win. 46.

If there be a partition, and one has the demesnes of the manor, and the other the services, the demesnes are severed from the manor. Sav. 113.

Or, where one has the manor, the other an advowson, villein, &c. these are severed. Ibid.

So, if the wife of the lord of the manor demands, and recovers dower, by the name of the third part of *tot. messuag. tot. acr. terr. &c.* she shall not have any manor. Ow. 4.

Though the sheriff delivers to her seisin of the third part of the demesnes and services ; for as to the services, it is void. R. Ow. 4.

So, if there be an extent of *tot. acr. terr. &c.* neither the manor, nor any thing appendant passes. Ow. 4.

If an advowson, acre of land, &c. be severed from the manor, though they be regranted, they shall never afterwards be appendant. 2 Mod. 2. Vide Appendant and Appurtenant, (D).

(Q 5.) Manor, how destroyed.

If all the freeholds escheat to the lord, the manor is extinct ; for there cannot be a manor, without a court-baron, nor a court without two suitors at least. 2 Rol. 122. l. 2. 5. 4 T. R. 443.

So, if the lord purchase all of them in fee. 2 Rol. 122. l. 2.

So, if all the servants are extinct, the manor fails. Yel. 191.

So, if a manor descends to parceners, and upon petition all the demesnes are allotted to one, and all the services to the other ; the manor is gone. 2 Rol. 122. l. 10. Per three J. 1 Leo, 204.

(Q 6.) How revived.

But where the severance which destroys a manor is by act of the law, it may be revived : as, if the demesnes are allotted to one parcener, and the services to the other, and one dies without issue, whereby her part descends to her sister, the manor shall be revived. 2 Rol. 122. l. 10. 25. 1 Leo. 204.

(Q 7.) How it shall be pleaded.

If a man pleads, that he or another is seised of a manor, he ought to allege the name of the manor, and it is not sufficient to say, that he was seised of a manor in such a parish. R. 2 Lev. 178.

(R 1.) COURT-BARON.

To every manor a court-baron is incident. Co. L. 58.

And therefore in a *quo warranto* for holding a court-baron, it is sufficient to plead, that he has a manor. 1 Bul. 54. 2 Cro. 260.

[*]And if he pleads that he has a manor, he ought not to prescribe for holding a court-baron. R. Noy, 20.

So, if he grants a manor, the court-baron passes as incident.

Though he accepts all courts ; for the exception is void, unless in the case of the king. R. Mo. 870.

And the profits of courts may be excepted by a common person. Ibid.

So, if the court of manor prescribes for suit *bis in anno*, it may be a court-baron. Sal. 604.

But there cannot be a court-baron without freeholders. Co. L. 58. a. [Willes, 614.]

[Such freehold tenants cannot be created at this day. Ibid.]

[If the lord now convey part of the demesnes of the manor to A. and his heirs, and other part to B. and his heirs, to hold as of his manor by fealty and suit of court, and then hold a court before those two tenants as free-tenants, the court is improperly holden, and any amercement at that court is consequently bad. Ibid.]

And therefore, where a manor is granted by copy, it may have a customary court, but shall not have a court-baron. R. 2 Cro. 260. Yel. 190. (p)

(R 2.) Customary court.

So, a manor has a customary court, as well as a court-baron. Co. L. 58. a.

And this concerns the copyhold tenants only. Ibid.

And may be held without freeholders. Ibid.

If a manor has a court of a double nature, viz. customary and court-baron, the proceedings of both may be entered in the same roll. Ibid.

But there cannot be a customary court without copyholders. Ibid.

(R 3.) Who shall be judge.

In a court-baron the freeholders are the judges. Co. L. 58. a. [4 T. R. 484.]

Though it be upon a writ of right patent, directed to the lord, or his bailiffs *quod rectum teneant*. R. Mo. 1.

But in the customary court the lord or his steward is the judge. Co. L. 58. a.

(R 4.) In what place it shall be held.

The court-baron ought to be held within the manor, otherwise it will be void. Co. L. 58. a.

But, by custom, the lord may hold a court, within one manor, for several manors. Co. L. 58. a. Cro. Car. 367.

So, a surrender may be made out of the manor. Vide ante, (F 2, &c.)

So, an admittance by the lord himself, though not by the steward. Vide ante, (G 7.)

So, a court may be held in the night, *post occasum solis*. R. Mo. 68.

[*](R 5.) Steward.—How retained.

A steward ought to be *fidelis, discretus, &c.* Fleta, lib. 2. cap. 66. Co. L. 61. b.

And may be retained by deed, or by parol. Co. L. 61. b. R. Dy. 248. a.

A retainer by parol may be for a court-leet, as well as for a court-baron. Co. L. 61. b.

A retainer by parol continues till it be discharged. Ibid.

A steward may make a deputy.

And a grant to an infant to be steward *per se, vel deputat.*, will be good. Cont. Co. El. 3. b. Cro. El. 637. R. acc. Cro. Car. 279. Jon. 310. R. 2 Jop. 126. Vide Infant, (C 1.) Vide Officer, (B 3.)

(p) To constitute a court-baron, there must be two free suitors, at the least, present. 4 T. R. 443. Id. 446.

So, a grant in reversion shall be good. R. 2 Jon. 126.

Or, a grant to two. R. 2 Jon. 127.

Or, a grant for years, if the grantee so long live. Ibid.

So, a grant of a stewardship of courts leet and baron shall be good for the court-baron; though it would not for the leet. R. 2 Jon. 126, 2 Lev. 245.

Who is a sufficient steward to make a grant, &c. Vide ante, (C 5.)

(R 6.) The duty of the steward.

A steward may make a grant or admittance, or take a surrender of copy-holds. Vide ante, (C 5.—F 3.—G 6, 7.) (q)

(R 7.) The form of holding the court.—Precept for it.

The usual method of holding a court-baron or leet is, that the steward makes a precept to give reasonable warning of the court. Kit. 6. a.

Warning for fifteen days is best, which is the common time between the teste and return of a writ in C. B. Kit. 6. a.

But six or seven days is sufficient. Ibid.

A precept to warn a court. A. B. *seneschallus ballivo manerii prædicti salutem. Tibi præcipio et pariter mando quod diligenter præmonire facias visum franc. pleg. cum curia baron. ibidem tenend. erga diem Jovis, videlicet, 12^m diem Octobris prox. futur. post datum præsent, et habeas ibi hoc. præcept' et qualiter, &c. Dat. sub sigillo meo 1^o die hujus mensis Octobris anno regni, &c.*

(R 8.) Style of the court.

The style of the court contains the time and place, and before what steward it is held. Kit. 6. b. 53. b.

The style of a court. *Visus franc. pleg. cum curia baron. J. B. militis domini manerii prædict. ibidem tent. die Jovis, videlicet, 12^o die Octobris anno regni, &c. fidei defensores, &c. 19^o coram A. B. arm. seneschallo ibidem.*

[*](R 9.) Proclamation.

After the style of the court is entered, the steward causes the bailiff to make proclamation, by O yes. Kit. 6. b. 53.

None can make proclamation, but by authority of the king, or by custom. Kit. 6. b.

At the adjournment of a term, or other matter for the king, three proclamations shall be made at the beginning. Ibid.

And, therefore, at the beginning of a court-leet, which is the king's court, three O yes shall be made. Ibid.

At the beginning of a court-baron but one. Ibid.

(R 10.) Essoigns, &c.

After proclamation made, the suitors or resiants shall be called. Kit. 6. b. 53. b.

Then proclamation shall be made *de novo*, and afterwards the steward shall say, if any one will be essoigned or enter plaint, let him come in. Kit. 7. a. 53. b.

And he may be essoigned by attorney. 1 Leo. 104.

(q) Steward to receive stamp duty, and deliver surrender within a year. 9 G. 1. c. 29. s. 6.—2. As to his fees, vide supra.

(R 11.) Enquest.

After essoigns and plaints entered, the enquest shall be impannelled and sworn. Kit. 7. a. 53. b.

(R 12.) Charge.

After the enquest sworn, and the proclamation *de novo*, the steward gives a charge to the enquest. Kit. 7. b. 53. b.

The charge admonishes them to present suitors who make default in doing suit. Vide Kit. 54. b.

2. The death of every tenant, and who is heir, and what profit accrues to the lord by his death, viz. relief, heriot, &c. Vide Kit. 55. a.

3. Forfeiture of any tenant by alienation, waste, &c. Ibid.

4. Substraction of lands or services from the lord. Vide Kit. 55. b.

5. Incroachment or trespass in his demesnes or waste. Vide Kit. 57. a.

6. Inclosure or surcharge, &c. of common. Vide Kit. 57. b.

Vide Kit. 54. b. &c.

(R 13.) Jurisdiction.—In actions personal. When allowed.

A court-baron may hold plea of actions personal, where the debt or damages are under 40s. Noy, 20. Vide Kit. 74. b.

As in debt. Vide Kit. 74. a.

So in debt upon bond under 40s. Vide Kit. 75. a.

So in an action upon the case under 40s. Vide Kit. 76. a.

So in detinue of goods. Vide Kit. 74. b.

So in trespass, without *vi & armis*, under 40s. Vide Kit. 74. a.

So an action lies there by the lord himself; for the suitors are the judges. Vide Kit. 74. a.

So by a stranger who comes into the manor. Vide Kit. 74. b.

[*](R 14.) When not.

But a court-baron cannot hold plea of common right above 40s. Vide County, (C 8.)

And if it does by prescription, it is not properly a court-baron, but a court of record, and error will lie upon a judgment there. Noy, 20.

So it cannot divide a debt into several plaints, each under 40s. Vide Kit. 74. a.

So trespass does not lie there *vi et armis*. Vide Kit. 74. b. 75. b.

Nor trespass by *justicies*; for it cannot be directed to the steward. Vide Kit. 74. b.

So in trespass without *vi et armis*, if the defendant pleads freehold, the court cannot proceed. Vide Kit. 74. a.

Or if he pleads that the plaintiff is his villein. Ibid.

So account does not lie in a court-baron. Vide Kit. 74. b.

Nor detinue of charters. Vide Kit. 74. a. 75. b.

Nor replevin, except where the lord claims it by charter or prescription. Kit. 74. b.

Nor waste. Vide Kit. 76. a.

Nor ejectment of ward. Ibid.

Nor *ejectione firmæ*. Ibid.

Nor assize. Ibid.

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Nor *quare impedit*, or other mixt action. Ibid.

Nor an action upon any statute. Ibid.

If an action be sued in a court-baron, in which it has no jurisdiction, prohibition may be sued. Vide Kit. 74. a. 75. a.

So, if a plea be pleaded which ousts the jurisdiction there. Vide Kit. 75. a.

So, if the defendant pleads, that the cause of action did not arise within the jurisdiction, and the plea is disallowed, upon affidavit a prohibition shall go. Vide Kit. 74, 75, &c.

So to trespass *vi & armis*, a *supersedeas* may be granted. Vide Kit. 75. b.

So, if it has no jurisdiction, the proceeding there is void, and trespass lies. Ibid.

(R 15.) In actions for land freehold.

So in a court-baron a writ of right patent may be sued, directed to the lord, or if he be out of the realm, to his bailiff, to do right, where his tenant in fee loses by default, or dies seised, and a stranger abates.

When it lies, and of what thing or not. Vide Droit, (B 1, 2.)

And if the lord refuses to hold a court, or to receive the writ, or to do right, a writ may be sued against him by the demandant to command him so to do. F. N. B. 3. E.

And hereupon he may have an *alias pluries* and attachment. F. N. B. 3. E.

Or demandant may remove the plea out of the court-baron by *tolt* to the county, and by *pone* from the county to C. B. without cause alleged. F. N. B. 3. F.

So the tenant with cause may remove it by *recordari*. F. N. B. 4. A.

[']But if a court-baron holds plea of freehold without writ, the judgment and execution thereupon shall be void, and he who enters upon such execution will be a disseisor. Kit. 74. b.

And by the st. de Marl. 52 H. 3. 22. *nullus possit distringere liberos tenentes ad respondend. de libero tenement. aut de aliquibus ad liberum tenementum spectan. sine brevi domini regis.*

So, the lord after, or before a writ directed to him, may give a licence to his tenant to sue a writ of right in C. B. whereupon he shall have right *quia dominus remisit curiam*. F. N. B. 2. F. Vide Droit, (B 1.—C 2.)

Or if such clause be omitted, the lord may certify his assent by letter to the king in chancery. F. N. B. 3. A.

Or if the tenant sues in C. B. without such letter or clause, and recovers, it shall be good, and the lord or tenant cannot avoid it. F. N. B. 3. B.

So, if a writ of right patent be sued in a court-baron, and the *mise* joined upon battail, or to be tried by the grand assize, the court cannot proceed. F. N. B. 4. E.

Or if a foreign plea be pleaded. F. N. B. 4. E.

If the court-baron proceeds after a foreign plea pleaded, or the *mise* joined upon the grand assize, a prohibition goes. F. N. B. 4. E.

(R 16.) Copyhold.

So a copyholder shall implead, or be impleaded for his tenements, by plaint in the nature of a real action in the court-baron; for he cannot implead by the king's writ. Lit. s. 76.

And, therefore, he may make plaint *de placito terræ*, with protestation to sue in the nature of a formedon, *mort d'ancestor*, assize, &c. Ibid.

Or in nature of a writ of entry in the *post*; and shall proceed thereupon as in such action at common law. Mo. 68.

The form of proceeding in right patent, vide in Droit, (B 1, &c.)

(R 17.) Trial.

In a court-baron all pleas of common right ought to be determined by wager of law. 2 Inst. 143. Vide County, (C 11.)

But by prescription a trial may be by jury. 2 Inst. 143.

Or *ex assensu partium*. Bro. Trial, 143.

(R 18.) Execution.—In personal actions.

If a recovery be in the court of the manor in a personal action, the plaintiff shall not have execution by *capias ad satisfaciendum*; for that does not lie in a court-baron. Kit. 115. b.

Nor by *elegit*; for that was given by the st. W. 2. 18. Vide Kit. 115. b.

Nor regularly by *feri facias* or *levari facias*. Vide Kit. 115. b.

But the plaintiff upon a precept from the steward, regularly, ought to distrain the goods of the defendant, and hold them in the nature of a distress, till he satisfies the condemnation. 1 Sal. 221. Vide Kit. 115. b.

And he cannot sell the distress, though it be the king's manor. R. 2 Cro. 255.

[*]Or, by custom he may take execution by *levari facias*, and appraise the goods, and sell them. Kit. 115. b. Lut. 1413. 1 Sal. 201.

Or, the lord may prescribe to sell the goods, upon an execution. Noy, 20.

(R 19.) In real.

So, in an action for copyhold land, pursued in the nature of a real action at common law, execution shall be by precept from the steward to the bailiff to deliver seisin. Kit. 254. b.

But C. B. will not aid a court-baron, with process to put the party into possession with a *posse manerii*. R. 3 Leo. 9.

So, if a judgment there be removed by *certiorari* to B. R., execution shall not be awarded thence. R. 1 Lev. 134.

How error shall be redressed, vide ante, (P 1, 2.)

(S) CUSTOM; THE NATURE OF IT.

(S 1.) Must be alleged in a particular place.

What a copyholder may or ought to do, or not, the custom of the manor directs. Co. L. 63. a.

Every custom is local, and shall be alleged not in the person, as a prescription, but in the manor or other place. Co. L. 113. b.

And it is *lex loci*; for in such a particular place it binds the persons or things concerned, as another law. Dav. 31. b. (r)

(r) 1. A custom for all and every the poor, necessitous, and indigent householders, and householders residing in the township of W. to cut rotten boughs in a chase, in the parish of W., is bad, since the parties entitled are of too vague and uncertain a description. 2 T. R. 758.—2. A custom is good though it extends to persons living out of the district in which the right it confers is to be exercised. 5 T. R. 412.—3. Though a particular custom may be claimed for those inhabiting within a parish, yet it cannot for those being in the parish. 2 H. B. 393.

Custom may be alleged in a manor or other particular place. Co. L. 113. b.

In a city or burrough. Kit. 105. a.

In a vill not burrough or corporate. Ibid.

So in a county ; as gavelkind. Ibid.

In a hundred or county ; as the Weld of Kent, &c.

But it cannot be alleged for the whole kingdom ; for that is the common law. Kit. 105. a.

(S 2.) Must be time out of mind.

To every custom there are two inseparable incidents, time and usage. Co. L. 113. b. Vide Prescription, (E 1.)

And therefore, continual usage and practice, from time whereof no memory is to the contrary, makes a custom. Dav. 32. a.

[And "ancient" custom, found in a special verdict, means "immemorial" custom. Cowp. 17.]

But a custom cannot be established by the king's grant. Ibid.

Nor by act of parliament. Ibid.

[*](S 3.) Must be reasonable.—What shall be so.

Every custom that is not contrary to reason may be allowed. Co. L. 62. a. Vide Prescription, (E 4.)

(S 4.) Though contrary to a rule of law.

A custom may be reasonable, though it be contrary to a rule or maxim of law. Dav. 32. a.

As the custom of gavelkind, that all the sons shall inherit. Dav. 32. a. Lit. s. 210. Vide Gavelkind.

Or burrough english, that the youngest son shall inherit. Co. L. 140. b.

Or the youngest son, if he be not of the half blood. Co. L. 140. b.

Or the eldest daughter, or sister, &c. Co. L. 140. b. Vide ante, (K 4.) Vide Burrough English.

So a custom, that a feoffment by tenant in tail with warranty, shall not make a discontinuance. Dav. 30. a. 1 Rol. 562. l. 47.

That the wife shall not have dower, where she receives money upon sale of the land. Dav. 30. b. 1 Rol. 562. l. 50.

That a widow, if she marries, shall not have dower. 1 Rol. 562. l. 52.

That a lease for years by a copyholder shall determine with his life. R. Hut. 101.

That an infant, at the age of fifteen, may make a feoffment. 1 Rol. 567. K.

That he may bind himself apprentice. 1 Rol. 567. l. 12.(s)

(S 5.) Though contrary to a statute.

So a custom may be reasonable, though there be a general provision by statute to the contrary, if the custom is not expressly taken away ; as, a custom that a tenant within the cinque ports shall not be in ward. Dy. 288, 239. Pal. 543.(t)

Vide Prescription, (F 3.)

(s) It is no objection to a custom, that it is not conformable to common law ; since it is of the very essence of a custom that it should vary from it. 6 T. R. 760.

(t) A custom contrary to an act of parliament cannot be supported. A custom, therefore, Vol. III. 28

(S 6.) If for a common benefit, though it tends to a particular prejudice.

So a custom shall be reasonable, if it be for the common benefit, though it tends to the prejudice of a particular person. Dav. 32. b.

As, a custom to make a bulwark for the defence of the realm, upon the land of another. Ibid.

Or to dry his nets upon the land of another. Ibid.

So, to turn his plough upon the headland of another; for it is for the benefit of agriculture. Dav. 30. a. 32. b.

So, that a searcher shall destroy all corrupt victual, which shall be put to sale within a manor. Per three J. North dub. 1 Mod. 202. 2 Mod. 56.

[*][So a custom to elect such a one resident within a private leet, within a hundred, constable of the hundred, is good, though he be also liable to serve that office within the leet. Cowp. 13.](u)

(S 7.) If it may have had a reasonable commencement.

So a custom shall be reasonable, which may have had a reasonable commencement, though otherwise it would be unreasonable. Vide post, (S 10.)

As a custom, that every tenant of a manor shall pay 3*l.* for a pound-breach, though it would not be good for a stranger; for the lord may give his tenements upon such terms. Kit. 104. b. Vide post, (S 13.)

That every tenant, who holds land in villenage, shall pay a fine upon the marriage of his daughter. Kit. 104. b. Co. L. 140. a.

That one shall have liberty to plough and sow, and after the corn is carried away, another shall have the land as his several. Kit. 104. b.

That a commoner shall not put cattle upon the common, after the corn is carried away, till Michaelmas. Kit. 105. a.

That every ship shall pay so much per ton of all merchandize in such an haven. 1 Sid. 18.

[So, where a corporation is entitled to customary duty on corn imported, a custom that factors free of the corporation, shall receive to their own use, that part of the duty which arises from corn consigned to them as factors, is good; for it may have had a reasonable commencement, as to encourage the importation of corn, or to encourage factors to take their freedom. Doug. 119. 134.]

[A custom may be good, though it tends to diminish the value of the lord's estate. 2 Vezey, 300.]

(S 8.) Though the right of another be restrained.

So, a custom may be reasonable, though the right of another be restrained; as a custom in restraint of trade in some respects. Vide Trade, (D 2.)

A custom that a lord may have a bakehouse for his tenants in the vill, and that none else shall bake there to sell. R. 1 Rol. 559. l. 20.

that every pound of butter sold in a market shall weigh eighteen ounces, is bad, since by the statute law there shall be only one weight throughout the kingdom. 3 T. R. 271.

(u) 1. A custom that every inhabitant of a parish, of the age of sixteen, of whatever religious sect, shall pay 4*d.* yearly, as an Easter offering, is good. Willes, 629.—2. A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes, in a particular close, at all seasonable times of the year, at their free will and pleasure, is valid. 2 H. B. 393.—3. A custom that tenants, whether by parol or deed, shall have the way-going crop after the expiration of their term, is good in law. Dougl. 201.

That all the inhabitants of a vill shall grind the grain they use there, at his mill. R. 1 Rol. 559. l. 40. [Doug. 218. 225.]

[But a custom to grind all corn, grain, or malt, which a man shall have occasion to use or spend at the mill of A., is unreasonable ; for it may extend to corn for horses, and at whatever distance the tenant may live. 1 Vezey, 56. Doug. 221.]

[A custom for all those who have any land in a common field to inclose as much thereof as they please, is good. Wils. 44.] (x)

[*](S 9.) If in general words.

So a custom in general words ought to have a reasonable construction ; as to distrain all things upon the land, shall be intended of all things distrainable. 1 Sid. 18.

(S 10.) What is not reasonable.—If it cannot have had a reasonable commencement.

But a custom is not reasonable, which cannot have had a reasonable commencement. Dav. 32. a. Vide ante, (S 7.)

For a custom need not have a lawful commencement, as a prescription, but ought to be reasonable in its commencement. 6 Co. 60. b.

And, therefore, the custom of tanistry in Ireland, that land shall go *seniori & dignissimo* of the blood and surname, is unreasonable ; for it commenced by power of the most potent. R. Dav. 34. b.

(S 11.) If contrary to the law of God.

So, a custom contrary to the law of God, is not reasonable. Vide Kit. 105. a.

(S 12.) Or contrary to the king's prerogative.

Nor a custom contrary to the king's prerogative ; for *nullum tempus occurrit regi*. Dav. 33. b. Vide Prescription, (F 1.)

As a custom to make a corporation. Dav. 33. b.

So, a custom that goods distrained within a manor for the king's debt, shall be brought to the lord's pound for three days, and if the debt in that time be paid, they shall be restored. 1 Rol. 566. l. 30.

So a custom to retain goods pledged till the money lent be satisfied, does not extend to the jewels of the crown. Dav. 33. b.

So, if a man has wreck, estrays, toll, &c. it does not extend to the goods of the king. 1 Rol. 566. l. 37.

(S 13.) If it be to a general prejudice, for the advantage of a particular person.

Nor a custom to the general prejudice, for the advantage of any particular person. Dav. 33. a.

As a custom, that no commoner shall put his cattle on the common till the lord has put his cattle there. Dav. 32. b.

(x) Where there is a custom in a manor, that upon the death of the tenant for life, he in remainder shall come in and be admitted tenant, and pay a fine, it is a good custom, although the admittance of tenant for life is the admittance of him in remainder. The proclamation to the tenant to come in to be admitted, is good in such a case, in general terms, without naming the particular tenant, although in the surrender he is named specially. 2 Smith, 116. 5 East. 522.

That no tenant shall marry his daughter, till he pays a fine to the lord. Dav. 33. a. Lit. s. 209.

That the lord shall take the cattle of a stranger levant and couchant upon the land, for his heriot. Dav. 33. a. Vide ante, (K 25.)

Or shall take 3*l*. of every stranger for a pound-breach. Dav. Vide 33. a. ante, (S 7.)

[*]That a tenant shall be amerced, if he does not put his cattle in the lord's pound. Dav. 33. a. R. 21 H. 7. 20.

That a man, who does not pay as much as is due to the church, shall forfeit so much to the lord of the same vill. 21 H. 7. 20. (y)

That a tenant fishing in the sea near his land, unless in the lord's boat, shall pay so much to the lord. Vide 21 H. 7. 20.

(S 14.) Or to the prejudice of any, where there is not an equal prejudice or advantage to others.

Nor a custom to the prejudice of any one, where there is not an equal prejudice or advantage to others, in the same case; as, that the sheep of several owners, upon the same tenement, shall be counted *insimul*, and decimated; for one may pay all his lambs for tithes, and another nothing. R. Hob. 329. (z)

(S 15.) If the custom be, that any one shall be judge for himself.

Nor a custom, that any one shall be judge for himself; as, that the lord shall detain a distress taken upon his demesnes, till fine made for the damage at his will. Dav. 33. a. Lit. s. 212. (a)

(S 16.) If it be against common right.

Nor a custom against common right; as, that a man shall have warren in land not held of him. Kit. 104. b.

That every tenant of the manor shall impound cattle in the lord's pound, for he may impound upon his own land. Kit. 105. b.

That if a tenant ceases for two years, the lord shall enter till he agrees for the arrears; for the tenant will be ousted of his inheritance without action. 1 Rol. 559. l. 50.

That a feme covert may make a devise of her lands. 1 Sid. 17.

[Or, that feme covert seized in fee of copyhold lands may dispose of her estate without her husband's joining. 2 Wils. 1.]

Or, that tenant in fee shall not devise his lands in such a vill. 1 Rol. 558. l. 15.

Or, shall not lease for above six years. Ibid.

That the wife of a tenant in fee shall not be endowed. 1 Rol. 563. l. 1.

That the wife shall have property of such a part of the goods during coverture, and shall dispose of them without her husband. 1 Rol. 563. l. 5. 609. l. 38.

(y) A custom that every man, inhabiting in the parish of A. who marries by licence in another parish, shall pay 5*s*. to the rector of A., for and in regard of the said marriage, as if it had been solemnized in A., is bad. Willes, 622.

(z) 1. A custom to take a profit in the soil of another, is good. 2 Blk. 926. 3 Wils. 456. 1 W. S. 341.—2. A custom for every inhabitant of an ancient messuage within a parish, to take a profit *a prendre* in the land of an individual, is bad. 4 T. R. 7. 57, 718.

(a) A custom warranting an amercement at the leet for a private injury to the lord of the manor, is void. 6 T. R. 511.

[*]That every freeholder shall pay a fine to the lord, upon the marriage of his daughter without licence. Co. L. 139, 140. (c)

(S 17.) Or against a prescriptive right.

Nor a custom against a right by prescription ; as, that any one may erect upon a new foundation, to the obstruction of ancient lights. R. 1 Rol. 558. l. 50. 566. l. 5.

So, if a man prescribe for a way, a custom that another may stop it up, is void. 1 Rol. 566. l. 20.

So, if he prescribe for common appendant or appurtenant, a custom that another may inclose, is void. R. 1 Rol. 565. l. 50. Jon. 375. Cro. Car. 432.

(S 18.) If it imports a loss on one side, without a benefit in consideration.

So, a custom is not reasonable, which imports a loss on one side, without a benefit in consideration ; as, that a lord of a manor shall have the best anchor and cable of every ship that strikes upon soil within his manor, and perishes there, though it be not a wreck. R. 3 Lev. 85. Vide 3 Lev. 307.

Though it be alleged, that the lord buries the dead cast from the ship ; for that is a matter of charity. 3 Lev. 307. (In 3 Lev. 307, 8. seems to be adjudged a good custom.)

So, a custom, that every ship which passes the river shall pay such a sum, because the city, &c. maintains a key for all goods unladen in the same city ; for this does not extend to ships which do not unlade there. R. 1 Vent. 71. 1 Mod. 47.

Or, because it maintains a key, and bushel for measuring of all goods. R. 2 Lev. 97. Ray. 232. 1 Mod. 104.

Though the goods are unladen at another place in the same river. 2 Lev. 97.

[So, a custom to sink coal-pits, and lay the rubbish, coal, wood, &c. near the mouth, on the land of another, at the will of the lord, is void ; as unreasonable, uncertain, and tending to make a man judge in his own cause. Wils. 63. Str. 1224.]

(S 19.) Must be certain.

So, a custom ought to be certain, otherwise it shall be void. Dav. 33. a. Vide Prescription, (E 3.)

As a custom, that an infant may make a feoffment, when he is of age to count 12d. or measure an ell of cloth. Dav. 33. a.

[*]That the tenant of a manor shall have all windfalls, who first comes to the place where they fell. Dav. 33. a. But, Dav. 35. Semb. cont.

(c) Several customs pleaded for all the tenants of a manor, their farmers and occupiers of tenements of the manor, having gardens, to take soil covered with grass on a common, for making and repairing grass-plots in gardens, for the improvement thereof, and for the improvement of the gardens ; and further, for the making and repairing of banks and mounds for the hedges of fences of tenements belonging to the manor ; and further, for the improvement of such tenements, not saying agricultural improvement. Held, each to be too large and uncertain, and destructive of the right of common. 3 Smith, 167. 7 East, 121.

That land shall descend *seniori et dignissimo* of the blood and surname. R. Dav. 35.

[So, a custom that the grantee of a customary estate, (which will pass either by surrender or deed and admittance) must be admitted during the life of the grantor, is good in law. Willes, 430.]

So, a custom that depends upon the will or pleasure of another, is uncertain and void: as, to have half a mark, or a horse, when the sheriff holds his tourn. Dav. 33. a.

That a lease by a copyholder for a year, shall determine by a surrender of the copyholder into the hands of the lord. Hut. 101. (d)

(S 20.) Custom, how destroyed.

If a custom be discontinued, it is gone. Dav. 33. b.

CORN.

Vide DISMES, (H 1.)—BIENS, (G 1, 2.)

CORONATION.

Vide ROY, (C.)

CLAIMS AT A CORONATION. Vide OFFICER, (E 6.)

CORONER.

Vide JUSTICES OF PEACE, (D 7.)—LONDON, (K 6.)—OFFICER, (G 1, &c.)

CORPORATION.

Vide FRANCHISES, (F 1, &c.—G 4, &c.)—CAPACITY.—DEVISE, (H 5, 6.)
—DISCONTINUANCE, (A 1.)—LONDON, (H.)—PLEADER, (2 B 1, 2.)

CORRECTION.

Vide LEET, (K.)—PLEADER, (3 M 19.)

HOUSE OF CORRECTION. Vide JUSTICES OF PEACE, (B 82.)—USES, (N 9.)

COSINAGE.

Vide ASSISE, (D.)

[*]COSTS.

(A) WHEN COSTS SHALL BE RECOVERED.

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(A 2.) When a plaintiff shall not recover costs. p. 237.

(A 3.) When no more costs than damages. p. 238.

(d) A custom, the extent of which is measured by "reasonableness," is sufficiently definite. 5 T. R. 412.

(A 4.) By an avowant. p. 246.

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(B) COSTS IN ERROR.

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(C) DOUBLE OR TREBLE COSTS.

(C 1.) By construction. p. 257.

(C 2.) By the express words of a statute.—Double costs. p. 258.

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[(D) HOW RECOVERED.]

(A) WHEN COSTS SHALL BE RECOVERED.

(A 1.) By a demandant or plaintiff.

By the common law costs were not recoverable in a plea real, personal, or mixt. 2 Inst. 288. 10 Co. 116. a. (e)

But now, by the st. of Gloc. 6 Ed. 1. 1. the demandant may recover the costs of his writ, in all cases where he may recover damages. (f)

And this extends to all the costs expended in the suit. 2 Inst. 288.

And to costs upon the first writ, where the plaintiff purchases another by Journeys Accompts. 2 Inst. 288.

[*]But he shall not have allowance for his trouble, or loss of time. 2 Inst. 288.

And the st. of Gloc. 6 Ed. 1. 1. gives costs, in all cases where damages are recoverable by the same or any former act. 10 Co. 116. a.

So, where any subsequent act gives damages, in a case where damages were recoverable before. 10 Co. 116. a. (g)

So, where a subsequent statute *de novo* gives a certain penalty and an action for it to the party grieved, he shall have costs; otherwise he might lose by the prosecution (h): as, in an action upon the st. 1 Ph. & M. 12. for taking more than 4*d.* for a distress, by which he loses 5*l.* R. Cro. Car. 560. 1 Rol. 516. l. 50. Jon. 447. 1 Vent. 133. Mar. 56.

In an action upon the st. 21 H. 8. 6. which gives 40*s.* for taking a mortuary not due. 1 Rol. 516. l. 35. Co. Ent. 164. Lut. 200.

(e) Hard. 152.

(f) 1. Costs are considered in a legal sense as being parcel of the damages. 9 East, 298. —2. And this statute was the origin of costs *de incremento*. Gilb. Eq. Rep. 195.

(g) And therefore where double or treble damages are given in a case where single damages were before recoverable. 10 Co. 116. a. 2 Inst. 289. Cowp. 368.

(h) 1 Ld. Rd. 172. Willes, 440. Say. 11. 7 T. R. 267. 1 H. Bl. 10.

Upon the st. 5 El. 9. which gives 10*l*. against a witness who does not appear upon a subpoena. R. 1 Sal. 206.

So, upon the st. 13 El. 5. which gives only a moiety of the penalty to the party grieved, for using a fraudulent deed. Co. Ent. 163. Lut. 200. 1 Rol. 517. l. 10.

So, where, by a private act, a penalty is given to the party grieved, the plaintiff shall have costs; for it is a duty vested before the action brought. R. Skin. 363. 367.

So, in an attachment upon a prohibition the plaintiff shall have costs, if the defendant be found guilty. 1 Rol. 516. l. 30. R. 3 Lev. 360. 2 Inst. 644.

So, if judgment be by default, and damages found upon a writ of inquiry. R. 2 Jon. 128. Ray. 387. 1 Vent. 348. 350.

And in prohibition, if the verdict be that the defendant proceeded after a prohibition delivered. 1 Rol. 516. l. 25. R. Cro. Car. 559. Jon. 447.

And now, by the st. 8 & 9 W. 3. 11. in all suits upon prohibition, if the plaintiff has judgment after plea, or demurrer. (i)

[*]So the plaintiff shall have costs, in debt for costs assessed for not proving a suggestion. R. 1 Rol. 516. l. 40.

And now, by the st. 8 & 9 W. 3. 11. in debt upon the st. 2 Ed. 6. 13. for not setting out his tythes, where the single value found by the jury does not exceed twenty nobles. (k)

And by the same statute, in all actions for waste, where the single value found does not exceed twenty nobles.

And by the same statute, the plaintiff shall have costs in a *scire facias*, if he obtains an award of execution after plea, or demurrer. (l)

(i) 1. The rule as to costs in prohibition on the st. 8 & 9 W. 3. c. 11. is, that the plaintiff succeeding after plea pleaded or demurrer joined, ought to have his costs from the time of the suggestion or first motion for a prohibition, and all costs incident and subsequent thereto. Ca. Pr. C. P. 11. Str. 82. 1062.—2. And where the defendant pleaded nothing to the merits, but only that he did not produce in the spiritual court after the prohibition, the court ordered the defendant to pay the plaintiff's costs of the proceedings in prohibition. Barnes, 148.—3. Where the defendant in prohibition, lets judgment go by default, the plaintiff is entitled by the common law to a writ to enquire of his damages, for the contempt in proceeding after the prohibition delivered, and of consequence by the st. of Gloucester, to his costs. Ca. Pr. C. P. 20.—4. In this case, however, the plaintiff is only entitled to costs from the time that the rule for a prohibition was made absolute, as the defendant could not possibly be in contempt before. Id. 21.—5. And where the plaintiff was nonsuited, it was holden that the defendant ought only to have the costs of the nonsuit, and not what were incurred by opposing the rule to shew cause why the writ should not be granted. Say. 137.—6. If judgment be given for the plaintiff as to part of what is in issue, he is entitled to costs, although a consultation be granted as to the residue. 2 Str. 1062.—7. And in like manner if the defendant prevail as to part, he is entitled to costs. Barnes, 138, 9.—8. But it seems he is not for succeeding on demurrer. Tidd. 930.—9. There is a proviso in the statute, that it shall not extend to executors or administrators. Vide Ca. Pr. 158. Pr. Reg. 118. Barnes, 127. 129. 3 East, 202. Tidd. 930, 931.

(k) In debt, for the penalty of the st. 2 & 3 Edw. 6. c. 13. for not setting out tithes, with a count for the single value, after a demurrer to the declaration, the parties submitted to arbitration, and the arbitrator awarded the single value to be less than twenty nobles (6*l*. 13*s*. 4*d*.): the court held that the plaintiff was not entitled to costs on the counts for the penalty under 8 & 9 W. 3. c. 11, the value not having been found by a jury; but they allowed him to have costs taxed on the count for the single value. 1 H. B. 107. Vide Barnes, 150.

(l) And after judgment by default in debt on bond to secure an annuity payable quarterly, and *scire facias* thereon suggesting a breach in non payment of a quarter's arrears, and damages assessed to that amount on 8 & 9 W. 3. c. 11. s. 8. K. B. held that plaintiff was entitled to his costs, on the above section, which directs a stay of proceedings, on payment of future damages, costs, and charges *solius quoties*, though the third section only gives costs in *scire facias* after plea or demurrer. 11 East, 387.

In a *scire facias* upon a recognizance by bail. Semb. 1 Sal. 208. (m)

[*]So the plaintiff shall have costs, if he has judgment upon demurrer, where he would have had them upon a verdict.

And in an action against an executor, or administrator. Hut. 79. D. Hard. 165.

(m) 1. On moving for a *mandamus*, or information in nature of a *quo warranto*, a rule is either granted or refused in the first instance; and if a rule to shew cause be granted, it is either made absolute or discharged; and in the latter case, with or without costs, according to circumstances. 3 Burr. 1453. 1 T. R. 396. 405. 2 Str. 1039. 2 Burr. 780. 4 Burr. 1963.—2. At common law, as a plaintiff might have recovered damages in an action upon the case for a false return to a *mandamus*, he is now entitled to costs where he succeeds in such action, by the statute of Gloucester; and where he fails therein, the defendant has a right to costs under 4 Jac. 1. c. 3. Hull. 327, 8.—3. And by 9 Ann. c. 20. after reciting that divers persons who had a right to the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and places within that part of Great Britain called England and Wales, or to be burgesses or freemen of such cities, &c., have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted, or restored to their said offices or franchises of being burgesses or freemen, than by writs of *mandamus*, the proceedings in which are very dilatory and expensive; it is enacted, that as often and in any of the cases aforesaid any writ of *mandamus* shall issue out of the king's bench, the courts of sessions, of counties palatine, or any of the courts of grand sessions in Wales, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons, suing or prosecuting such writ of *mandamus*, to plead to or traverse all or any the material facts contained within the said return, to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings and in such manner shall be had therein for the determination thereof, as might have been had, if the person or persons suing such writ had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same, in such place as an issue joint in such action on the case should or might have been tried; and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them, upon a demurrer or by *nil dicu*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs, in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *ca. ad. sa. fi. fa.* or *elegit*; and a peremptory writ of *mandamus* shall be granted without delay, for him or them for whom judgment shall be given, as might have been if such return had been judged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid.—4. But no provision being made for costs by this statute, where the writ is obeyed, the st. 12 G. 3. c. 21. after reciting that although a writ of *mandamus*, to admit any person to the franchise of being a citizen, burgess, or freeman of any city, town corporate, borough, cinque port, or place within England or Wales, be obeyed, the person applying for the same is nevertheless put to great trouble, delay, and expence; and that by the laws in being in many cases no provision is made for giving costs to the party suing out any such writ, where the same is obeyed; enacts, that where any person shall be entitled to be admitted a citizen, burgess, or freeman of any such city, &c. and shall apply to the mayor or other person, officer or officers, in such city, &c. who have or hath authority to admit citizens, burgesses, and freemen therein, to be admitted a citizen, burgess, or freeman thereof; and shall give notice, specifying the nature of his claim, to such mayor or other officer or officers, that if he or they shall not so admit such person a citizen, burgess, or freeman, within one month from the time of such notice, the court of K. B. will be applied to for a writ of *mandamus* to compel such admission; and if such mayor or other officer or officers shall, after such notice, refuse or neglect to admit such person, and a writ of *mandamus* shall afterwards issue, to compel such mayor or other officer or officers to make such admission, and in obedience to such writ, such persons shall be admitted by the said mayor, or other officer or officers, a citizen, &c. of such city, &c., then such person shall (unless the court shall see just cause to the contrary) obtain and receive from the said mayor, or other officer or officers, so neglecting or refusing as aforesaid, all the costs to which he shall have been put in applying for, obtaining, and serving such writ of *mandamus*, and enforcing the same, by a rule to be made by the court out of which such writ shall issue, for the payment thereof, together with the costs of applying for, obtaining, and enforcing the said rule; and if the rule so to be made shall not be obeyed, then the same shall be enforced, in such manner as other rules made by the said court are or may be enforced by law.—5. Before the exhibiting of an information in nature of a *quo warranto*, the relator ought to enter into a recognizance in 20l.

[*]So, where several damages are given, he shall have entire costs, though he has judgment only for part. Hob. 6.

By the st. 33 H. 8. 39. in suits upon specialty to the king, or to another to his use, the king shall recover his costs and damages as other common persons do in their suits. (n)

to prosecute the same with effect, &c. pursuant to st. 4 & 5 W. & M. c. 18. 1 Salk. 376. Carth. 503.—6. And if he do not proceed to trial within a year after issue joined, the defendant is entitled to costs, to the extent of such recognizance. C. T. H. 247. 2 Str. 1042.—7. It is also enacted by the st. 9 Ann. c. 20. s. 5. that in case any person or persons against whom any information or informations, in the nature of a *quo warranto*, shall in any of the said cases (already mentioned in treating of costs on writs of *mandamus*) be exhibited in any of the said courts of King's Bench, &c., shall be found or adjudged guilty of a usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of ouster against such person or persons of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or her usurping, &c. any of the said offices or franchises; and also to give judgment, that the relator or relators in such information named, shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given, shall recover his or their costs therein expended, against such relator or relators; such costs to be levied in manner aforesaid.—8. This statute is confined to corporate offices. 1 Burr. 402. 1 Blk. 93. Vide 9 East, 469.—9. But in the cases to which it applies, if any one of several issues on a *quo warranto* information, be found for the prosecutor, or for which judgment of ouster is given, he is entitled to costs on all the issues. 1 T. R. 453.—10. The prosecutor of an information in nature of *que warranto* shall pay costs on the statute for not proceeding to trial according to notice. 1 Str. 33. Say. 130.—11. And a defendant in execution for the contempt, and for costs on a *que warranto* information, is entitled to be discharged under the Lords' act. 4 T. R. 809.—12. By 32 G. 3. c. 58. (which gives the defendant a right to plead the statute of limitations, &c. to an information in nature of *quo warranto*), if upon the trial of such information, the issue joined upon the plea aforesaid shall be found for the defendant or defendants, or any of them, he or they shall be entitled to judgment, and to such and the like costs as he or they would by law have been entitled to, if a verdict and judgment had been given for him or them upon the merits of his or their title: provided always, that in every such case, the prosecutor of such information may reply to such plea, any forfeiture, surrender, or avoidance by the defendant, of such office or franchise, happening within six years before the exhibition of such information; whereon the defendant may take issue, and shall be entitled to costs in manner aforesaid. Tidd. 931. 935.

(n) 1. Executors and administrators, when defendants, have no privilege with respect to costs. Plowd. 183. Hut. 69. 79.—2. And if there be a verdict against them, the judgment is, that the costs be levied of the goods of the testator or intestate, if the defendant hath so much thereof in his hands to be administered, and if not, *de bonis propriis*. 4 T. R. 648. 7 T. R. 359.—3. A bankrupt sued as executor, pleaded a false plea, and it being found against him, the plaintiff had judgment for the costs *de bonis propriis*, after which he obtained his certificate; and the court held, that this judgment for the costs was not discharged by the certificate. 3 Bur. 1368. 1 Blac. Rep. 400. S. C.—4. But where an executor or administrator pleads *plene administravit*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *in futuro*, the defendant is not liable to costs. See Rast. Ent. 323. 8 Co. 134. 2 Saund. 226. Sid. 448. S. C.—5. And where an executor or administrator pleads several pleas to the whole declaration, as *non assumpsit*, and *plene administravit*, and one of them is found for him, he is entitled to the *postea* and costs, though the other plea be found against him. E. 22 Geo. 3. K. B. T. 23 Geo. 3. K. B.—6. But if the plaintiff take judgment of assets *in futuro*, upon the plea of *plene administravit*, and go to trial upon the plea of *non assumpsit*, he will be entitled to costs, if he obtain a verdict; and therefore in such case, unless the defendant has a good ground of defence upon *non assumpsit*, it is usual for him to move to withdraw his plea, which the court will permit him to do upon payment of costs. 2 Blac. Rep. 1275.—7. So where an executor pleaded *non assumpsit* and *plene administravit*, on which the plaintiff took issue, and a bond and mortgage outstanding, and *plene administravit præter*, on which latter plea the defendant took judgment of assets *quando acciderint*, and there was a verdict for the plaintiff, on the plea of *non assumpsit*, and for the defendant on the issue of *plene administravit*; the court held that the plaintiff, being at all events entitled to judgment of assets *quando*, and having been compelled by the defendant's pleading *non assumpsit*, to go down to trial, was entitled to retain the *postea*, and to have the general costs of the trial, though the issue of *plene administravit* was found against him. 12 East, 232. Tidd. 966, 967.—8. In what cases executors and administrators shall

(A 2.) When a plaintiff shall not recover costs. Vide post, (D.)

But the plaintiff shall not have costs, where a statute since the st. of Gloucester gives damages generally, in a case where no damages at all were recoverable before: As, in (o) *quare impedit*. 10 Co. 116. a. Cont. where the church was full at the time of the *quare impedit*. Skin. 25.

So a plaintiff, who sues *qui tam*, &c. shall not have costs, be the penalty certain or uncertain. R. 1 Vent. 133. 1 Sal. 206. (p)

As upon the st. 31 El. 12. for not paying toll for a horse before sale. 3 Lev. 374. Lut. 200.

Upon the st. 5 El. 9. for 20*l*. against him who commits perjury. R. Hut. 22. 1 Brownl. 66. Dub. Cro. El. 177.

So the plaintiff shall not have costs against the garnishee in a foreign attachment. R. Cro. El. 172.

[*]Nor in a *scire facias*, till the st. 8 & 9 W. 3. 11. Lat. 101. Dal. 95.(q)

be liable for costs. Parker v. Stephens, 1 Hayw. 218. Simmons v. Radcliff, 2 Hayw. 341. Frink v. Luyten, 2 Bay, 166. Vanderhorst's Ex'rs. v. Whitner, 2 Bay, 399. Hardy v. Call, 16 Mass. Rep. 530. Brown v. Lambert, 16 Johns. Rep. 148. Hogeboom v. Clark, 17 Johns, 268. Thornton v. Jett, 1 Wash. 139.—9. Heirs and devisees not liable for costs in certain cases. Pennington v. Hanby, 4 Munf. 144. }

(o) 1. Real actions.—2. Prohibition. Comb. 20.—3. So when double or treble damages were given by a subsequent statute, in a new case where single damages were not before recoverable, as in waste, against tenant for life or years, upon the statute of Gloucester. 2 Hen. 4. 17. 9 Hen. 6. 66. 10 Co. 116. 2 Inst. 289.—4. For not setting out tithes upon the 2 & 3 Ed. 6. c. 13. Moor, 915. Noy, 136. Hard. 152.—5. *Secus* where single damages are given to the party grieved. 2 Wils. 91. Barnes, 151. 3 Burr. 1723. Say. 10. 1 Tr. 71. 6 T. R. 355. 7 T. R. 267. Vide Cowp. 367, 8.

(p) 1 Rol. Ab. 574. Carth. 231. Comb. 449. 5 Mod. 355. 1 Ld. Rd. 172. Ca. Pr. C. P. 87. Barnes, 124. Cowp. 366. 1 H. B. 10. B. N. P. 333.

(q) 1. By the Welch judicature act, 13 Geo. 3. c. 51. s. 1, "in case the plaintiff in any action upon the case for words, debt, trespass on the case, assault and battery, or other personal (vide 1 N. A. 267.) action, where the cause of action shall arise in Wales, and which shall be tried at the assizes at the nearest English county to that part of Wales in which the cause of action shall be laid to arise, shall not recover by verdict a debt or damages to the amount of ten pounds; if the judge who tried the cause, on evidence appearing before him, shall certify on the back of the record of *nisi prius*, that the defendant was resident in Wales at the time of the service of the writ, or other mense process served on him; on such fact being suggested on the record or judgment-roll, a judgment of nonsuit shall be entered against the plaintiff, and the defendant shall be entitled to, and have like judgment and remedy to recover his costs against the plaintiff, as if a verdict had been given by the jury for the defendant; unless the judge, before whom the cause shall be tried, shall certify on the back of the record, that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, or that the cause was proper to be tried in such English county."—2. And by s. 2. "in all transitory actions, arising within the principality of Wales, which shall be brought in any of his majesty's courts of record, out of the said principality, if the venue therein shall be laid in any county or place out of the said principality, and the debt or damages found by the jury shall not amount to the sum of ten pounds, and it shall appear, upon the evidence given on the trial, that the cause of action arose in Wales, and that the defendant was resident therein at the time of the service of any writ, &c. and it shall be so certified, under the hand of the judge who tried the cause, upon the back of the record of *nisi prius*; on such facts being suggested on the record or judgment-roll, a judgment of nonsuit shall be entered thereon against the plaintiff, and he shall pay to the defendant his costs of suit, &c. And, in the taxation of costs, the proper officer shall allow to the plaintiff, out of the defendant's costs, the full sum given him by the verdict."—3. In actions or prosecutions on the revenue laws, it is enacted by the statute 28 Geo. 3. c. 37. s. 24. that "in case any information or suit shall be commenced and brought to trial, on account of the seizure of any goods, wares, or merchandize, seized as forfeited by virtue of any act or acts of parliament relating to his majesty's revenues of customs or excise, or of any ship, vessel, or boat, or of any horse, cattle, or carriage used or employed in removing or carrying the same, wherein a verdict shall be found for the claimer thereof, and it shall appear to the judge or court before whom the same shall be tried or heard, that there was a probable cause of seizure, the judge or court shall certify that there was a probable cause for making such seizure; and in such case the claimant shall not be entitled to any costs of suit whatsoever."—4. And see the statutes 19 Geo. 2. c. 34. s. 16.

(A 3.) When no more costs than damages.

By the st. 43 El. 6. in personal actions in the courts (r) of Westminster (and by the st. 11 & 12 W. 3. 9. in the courts in Wales, Chester, [*] Lancaster and Durham), if it appears that the debt or damages amount not to 40s. the plaintiff shall have no more costs than damages. (s)

23 Geo. 3. c. 70. s. 29. E. 22 Geo. 3. K. B.—5. In actions upon judgments, it is enacted by the statute 43 Geo. 3. c. 46. s. 4. that "the plaintiffs shall not recover or be entitled to any costs of suit, unless the court in which such action shall be brought, or some judge of the same court, shall otherwise order. See 2 Blac. Rep. 785.—6. But this statute does not extend to an action brought by the defendant, to recover the costs of a judgment of nonsuit, but only to judgments recovered by plaintiffs." 14 East, 343.—7. And in actions against justices of the peace on account of a conviction, or any thing done by them for carrying the same into effect, in case such conviction shall have been quashed, the plaintiff, besides the value and amount of the penalty, in case the same shall have been levied, shall not be entitled to recover any costs of suit; unless it shall be expressly alleged in the declaration, that such acts were done maliciously, and without any reasonable or probable cause; nor in case it shall be proved at the trial, that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence. 43 Geo. 3. c. 141. Tidd. 955. 957.

(r) 1. None of the statutes made for restraining the plaintiff's right to costs, except the 21 Jac. 1. c. 16. extend to actions brought in an inferior court, and removed by the defendant into a superior one. 2 Lev. 124. 4 Mod. 378, 9. 1 Ld. Rd. 395. Cas. Pr. C. P. 45. a.—2. And it has been holden, that the latter statute, 1 Salk. 207. as well as the 22 & 23 Car. 2. c. 9., Cas. Pr. C. P. 45. only restrains the court from awarding more costs than damages; but the jury, not being restrained thereby, may give what costs they please. Tidd, 952, 953.

(s) 1. The intention of the statute was to confine trifling actions to inferior courts. Gilb. Eq. Rep. 196. Gilb. C. P. 261, 2.—2. And a certificate may be granted upon it, at any time after the trial of the cause. Say. 18. 3 T. R. 38. n.—3. The first instance of a certificate being granted upon the statute was in the case of White v. Smith, E. 17 G. 2. wherein Willes, C. J. certified in an action for taking sand. 2 Str. 1232. 1 Wils. 93. 3 Wils. 325.—4. Since which time, there have been several instances of such certificates. Id. Say. 250. 2 Wils. 258. 3 T. R. 37.—5. Where a statute prohibits an act, and gives damages for the violation, with costs of suit, it does not take away the judge's power to certify under 43 Eliz. c. 6., that the damages are less than 40s. 1 Taunt. 400.—6. And a certificate may be granted upon this statute, in an action on the case for an injury done to the plaintiff's right of common by digging turves. 8 East. 294.—7. Or in an action of assault, battery, and imprisonment, if no actual battery be proved. 1 N. R. 255.—8. And even if a battery be proved, this will not prevent the judge from certifying with respect to the imprisonment under the 43 Eliz., and though he cannot certify as to the battery, yet the plaintiff will not be entitled to full costs for that, unless the judge certify under the 22 & 23 Car. 2. c. 9. 2 N. R. 471.—9. If there be a certificate upon this statute, the plaintiff shall not have the costs of any plea pleaded with leave of the court; although the issue thereupon joined be found for him, and the judge have not certified that the defendant had a probable cause for pleading the matter therein pleaded. Tidd. 676.—10. By 3 Jac. 1. c. 15. s. 4. if in any action of debt, or action upon the case upon an assumpsit for the recovery of any debt, to be sued or prosecuted against any citizen or freeman of the city of London, or any other person, being a victualler, tradesman, or labouring man, inhabiting within the said city or the liberties thereof, in any of the king's courts at Westminster, or elsewhere out of the court of requests for the same city, it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff shall not amount to the sum of 40s., and the defendant shall duly prove, either by sufficient testimony or his own oath, that at the time of commencing such action the defendant was inhabiting and resident in the city of London or the liberties thereof, the said judge or judges shall not allow to the plaintiff any costs of suit, but shall award the plaintiff to pay so much ordinary costs to the defendant as the defendant shall justly prove before the said judge or judges, it hath truly cost him in defence of the suit.—11. The jurisdiction of the court of requests for London was extended, by the 14 G. 2. c. 10. to "every citizen and freeman of the city of London, and every other person and persons inhabiting within the said city or its liberties, and also to persons renting or keeping any shop, shed, stall or stand, or seeking a livelihood there, who have debts owing them, not exceeding the sum of forty shillings, by any person or persons inhabiting or seeking a livelihood within the said city or its liberties, during their respective inhabitancy or seeking a livelihood as aforesaid." See 5 T. R. 535. 1 East, 353. a. S. C. cited.—12. And by the 39

& 40 Geo. 3. c. 104. it was still further extended to "debts not exceeding the sum of 5*l.* s. 2. due to any person or persons, whether residing within the city of London or elsewhere, or to bodies politic or corporate, and fraternities or brotherhoods, whether corporate or not corporate, from any person or persons residing or inhabiting within the said city or its liberties, or keeping any house, warehouse, shop, shed, stall or stand, or seeking a livelihood, or trading or dealing within the same city or liberties. s. 5.—13. And if any action or suit shall be commenced in any other court than the said court of requests, for any debt not exceeding the sum of 5*l.* and recoverable by virtue of the former acts, or of this act, in the said court of requests, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the judge or judges before whom the same shall be tried or heard, shall think fit to certify that such debt ought to have been recovered in the said court of requests, then such defendant or defendants shall have double costs, and shall have such remedy for recovering the same, as any defendant or defendants may have for his, her, or their costs, in any cases by law." s. 12.—14. This act of parliament has been construed to extend to an action of debt for less than five pounds, on the judgment of a superior court. 2 Bos. & Pul. 588. Vide 3 Esp. Cas. Ni. Pri. 280.—15. And the court of requests have jurisdiction [*] under it, over a contract for the retention of tithes by the tenant, the value of which was under 5*l.*—16. And therefore if the vicar sue for the same, and recover less than 5*l.* upon a count in *assumpsit* on a *quantum valebant*, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of London, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs. 5 East, 194.—17. The criterion in these cases is the sum recovered by the verdict; and if that be under 5*l.*, the defendant is entitled to a suggestion for costs, though the action was brought for the recovery of a larger sum. 2 Taunt. 169.—18. There are some distinctions deserving notice, between the former acts of parliament, for the recovery of small debts in London, and the 39 & 40 Geo. 3. c. 104.—19. By the former acts, the court of requests had no jurisdiction in a suit, unless both the plaintiff and defendant were resident within the city. 2 H. Blac. 220.—20. But this is not necessary under the 39 & 40 Geo. 3. c. 104. which extends the jurisdiction of the court to debts not exceeding 5*l.*, due to any person or persons, whether residing within the city or elsewhere.—21. It is necessary however, under the latter act, that the defendant should be a person residing or inhabiting within the city or its liberties, or keeping a house, &c. or seeking a livelihood there.—22. And if a party's residence be out of the jurisdiction of the court of requests for London, his occasionally underwriting a policy at Lloyd's coffee-house, where he has a seat, is not a seeking his livelihood within the city, so as to subject him to the jurisdiction of the court; it must be followed as a trade or business. 5 Esp. Cas. Ni. Pri. 19., and see 1 Smith, R. 334.—23. So where a defendant resided in Middlesex, and kept a warehouse, in the city of London jointly with another person, but told the plaintiff that he did not keep the warehouse, and the plaintiff, upon enquiry in the neighbourhood where it was, could obtain no intelligence respecting him, the court of Common Pleas would not, under the above act of parliament, exempt the defendant from payment of costs, on the ground of the verdict being under five pounds, and that he ought to have been summoned to the court of requests. 1 New Rep. C. P. 153.—24. So a market gardener, who rented a stand with a shed over it, in Fleet Market, at an annual rent, which he occupied three times a week, on market days, till ten o'clock in the morning, after which, and on all other days, it was occupied by others, was held not to keep a stand, within the meaning of the London court of requests act, so as to be privileged to be sued there for a debt under five pounds. 8 East, 336.—25. And in a late case, a person plying as a porter in the city of London, and resorting to a house of call there, but not lodging in the city, was holden not to be a person seeking his livelihood in London, within the meaning of the above act. 2 Taunt. 196. and see 13 East, 161.—26. It should also be observed, that under the former acts, the plaintiff is not only prevented from recovering his costs, upon a suggestion that the debt is under forty shillings, but shall pay costs to the defendant: but the statute 39 & 40 Geo. 3. c. 104. only prevents the plaintiff from recovering his costs, on a verdict in his favour for less than five pounds, and does not give any costs to the defendant; though if a verdict be given for the latter, he is entitled by the act to double costs, on the judge's certifying that the debt ought to have been recovered in the court of requests.—27. The court of requests in London having been found extremely beneficial, courts of a similar nature were, towards the end of the last reign, established, by act of parliament, in various districts, in and about the metropolis.—28. As in the town and borough of Southwark, &c. by the 22 Geo. 2. c. 47. (explained and amended by the 32 Geo. 2. c. 6.)—29. In the city and liberty of Westminster, and part of the duchy of Lancaster, by the 23 Geo. 2. c. 27. (explained and amended by the 24 Geo. 2. c. 42.)—30. And in the Tower-hamlets, by the 23 Geo. 2. c. 30.—31. The county court of Middlesex was also put on a different footing, by the 23 Geo. 2. c. 33. for the more easy and speedy recovery of small debts.—32. And in the present reign, the jurisdiction of these courts has in several instances been extended to sums not exceeding five pounds.—33. As

in London, by the 39 & 40 Geo. 3. c. 104. before mentioned.—34. In Southwark, and the east half hundred of Brixton, by the 46 Geo. 3. c. 87.—35. In Birmingham, by the 47 Geo. 3. sess. 1. c. 14.—36. And in Manchester, by the 48 Geo. 3. c. 43.—37. And in the city of Bath and its environs, the jurisdiction of the court of requests has been extended to sums not exceeding ten pounds, by the statute 45 Geo. 3. c. 67.—38. In these acts of parliament there are exceptions, relating to particular causes and persons, of which, and over whom the courts have no jurisdiction.—39. Thus, in the 3 Jac. 1. c. 15. there is an exception or proviso, s. 6. ; and see 39 & 40 Geo. 3. c. 104. s. 11. 1 Smith, R. 396. that "it shall not extend to any debt for rent, upon any lease of lands or tenements, or any other real contracts, nor to any other debt that shall arise by reason of any cause concerning a testament or matrimony, or any thing concerning or properly belonging to the ecclesiastical court, although the same be under forty shillings."—40. And there is a similar exception in the court of conscience acts for Westminster. 22 Geo. 2. c. 47. [*]s. 16.—41. And the Tower-hamlets. Doug. 245.—42. And in the act for Southwark, 46 Geo. 3. c. 87. there is a clause, that it shall not extend to any debt for any sum, being the balance of an account on demand, originally exceeding five pounds. s. 12.—43. The exception in the London act, has been extended to an action for use and occupation. Doug. 244., and see 13 East, 161. Vide 2 Bos. & Pul. 29.—44. And the court of conscience act there does not extend to cases where the plaintiff recovers less than the limited sum, in a special action on the case, for the breach of an agreement. 5 T. R. 529.—45. Or in an action on the case for negligence, in driving the plaintiff's carriage, contrary to an implied *assumpsit*. 1 Taunt. 396.—46. Nor does the jurisdiction of the courts of conscience extend to contracts made on the high seas. 1 Bos. & Pul. 223.—47. Also it is a constant and invariable rule, that none of the court of conscience acts extend to cases, where the sum recovered is reduced under the limited sum, by means of a set-off. 2 Str. 1191. 1 Wils. 19. S. C. 2 Wils. 68. Barnes, 470. S. C. 3 Wils. 48. Say. Costs, 65. S. C. 1 Bos. & Pul. 223 ; or tender, Dougl. 448, 9.—48. And in the Common Pleas it has been holden, that if a debt originally above five pounds, be reduced under that sum by partial payments, it is within the exception of the Southwark act. 46 Geo. 3. c. 87. s. 12.—49. But in general it is otherwise, where the reduction is made by payments in part. Barnes, 353. 4 Burr. 2133. 8 East, 28. 347. ; but see 1 Bos. & Pul. 223. Semb. contra. 1 Taunt. 60 ; or the defence of infancy. 14 East, 301.—50. And where a demand for plumber's work and materials, to the amount of eight pounds, was reduced below five pounds, by the plaintiff's taking and allowing for the old lead, the court of King's Bench held, that the plaintiff was not entitled to his costs under the Southwark act, 46 Geo. 3. c. 87.—51. And that this was not a demand reduced below five pounds by balancing an account, within the exception of the twelfth section. 14 East, 344.—52. It is not a sufficient ground for refusing a suggestion, under the 22 Geo. 2. c. 47. that a court of conscience has no authority to try a question of bankruptcy. 1 Bos. & Pul. 11.—53. And where a cause is referred to arbitration, and the costs are directed to abide the event of the suit, the plaintiff, we have seen, is not entitled to them, if it appear by the award that his original demand was under forty shillings, and he might have recovered it in a court of conscience.—54. The court in one instance permitted a suggestion to be entered on the roll, in an action brought by an administrator. Doug. 246., and see 1 Bos. & Pul. 12.—55. But in an action brought against an executor, they refused it. Doug. 263. stat. 14 Geo. 2. c. 10. 5 T. R. 535. Id. 529. ; saying, it could not be meant to give the court of conscience a jurisdiction over executors ; and that if there was no express exception, there was one implied from the nature and reason of the thing.—56. An attorney, when plaintiff, is not obliged to sue for a debt under five pounds, in the court of requests for London. 7 East, 47. 3 Smith, R. 52. S. C. —57. And when defendant is not subject to the jurisdiction of the county court of Middlesex. 2 Wils. 42. Doug. 380. 3 Bur. 1583. semb. contra ; and see 2 Bos. & Pul. 29.—58. But in London, Westminster, and the Tower-hamlets, he is expressly subjected thereto.—59. And where a person is sued in a superior court, for a debt under forty shillings, he may move the court to stay the proceedings.—60. The mode of taking advantage of these statutes is by plea, suggestion, or motion.—61. Where there is a prohibitory clause in the act, declaring that "no action for any debt under forty shillings, and recoverable in the court of requests, shall be brought against any person within the jurisdiction thereof, in any other court whatsoever," as in Westminster, the proper mode of taking advantage of the act is by pleading it, or giving it in evidence under the general issue. 2 H. Blac. 352.—62. And if that mode be not adopted, the court will not, after verdict, enter a suggestion on the record, that the defendant lived within the jurisdiction, or stay the proceedings. 3 T. R. 453. 1 East, 354. a. S. C. cited. 43 Geo. 3. K. B.—63. The Tower-hamlet act has the same prohibitory clause ; and though it gives no form of plea, yet it may be pleaded, or the facts which bring a case within it may be given in evidence under the general issue, to nonsuit the plaintiff. 2 H. Black. 352.—64. Or obtain a verdict against him. 1 East, 352.—65. In the London act, as well as in the acts for Southwark and Middlesex, there is no such prohibitory clause ; and therefore the proper mode of proceeding upon these acts is, for the defendant to apply to the court by affidavit, for leave to enter a suggestion on the roll

[*]Nor by the st. 21 Jac. 16. in an action for slander if the damages are under 40s.(t)

Nor, by the st. 22 & 23 Car. 2. 9. s. 149. in other personal actions, unless where the judge at the trial certifies a battery to be proved, or a title to be principally in question; and judgment for more costs shall be void. 1 Vent. 256.(u)

of the facts necessary to entitle him to the benefit of the act. 1 Str. 47. 50. 2 Str. 1120. 1191. Barnes, 353. 470, 71. Say. Rep. 273. Say. Costs, 64. S. C. 2 Wils. 68. Barnes, 470. S. C. Doug. 244.—66. Which suggestion may be traversed, or demurred to. Barnes, 471. 2 H. Blac. 354.—67. And where the plaintiff demurred to the suggestion, which was adjudged against him, the costs of the application were allowed, as well as of the trial and former proceedings, (2 Str. 1120.) though not strictly speaking costs of the defence.—68. The application for leave to enter a suggestion should be made before final judgment signed. 2 H. Blac. 354. 8 East, 239.—69. And the affidavit in support of it must state that the parties were within the jurisdiction, when the cause of action arose. 2 H. Blac. 220. 2 Taunt. 169.—70. And in Middlesex it should be sworn, that the defendant was liable to be summoned to the court of requests. 2 H. Blac. 356.—71. But this does not seem to be necessary in London. 2 Taunt. 169.—72. After judgment by default, and damages assessed under five pounds upon a writ of inquiry, a suggestion cannot it seems be properly entered on the roll. 1 Str. 46.—73. But the defendant may come into court under the London act, and move to stay proceedings, on payment of the damages assessed, without costs. 8 East, 239.; and see 2 H. Blac. 351. 2 Bos. & Pul. 588.—74. And the distinction is said to be this; that where the intent is to call upon the other party to pay costs, it is necessary to enter a suggestion, but where the intent is to exonerate the party applying, and the other party is not entitled to costs at all, a motion is sufficient to take them from him. 1 Taunt. 397. per Best, serjeant. Tidd. 937. 946.

(t) 1. The operation of this statute is confined to actions for slanderous words spoken of the person; and does not extend to an action for a libel. 24 Geo. 3. K. B.—2. Or for slander of title, &c. Cro. Car. 141. 163. 1 Str. 645. wherein the special damage is the gist of the action.—3. Neither, for the same reason, does it extend to an action for special damage, in consequence of words not in themselves actionable. 2 Ld. Raym. 831. 1 Salk. 206. 7 Mod. 129. S. C. Willes. 438. Barnes, 132. S. C. Id. 135. 2 H. Blac. 531.—4. Though, where the words are actionable in themselves, a special damage will not take the case out of the statute. 2 Ld. Raym. 1588. 2 Str. 936. S. C. Willes, 438. Barnes, 132. S. C. Id. 142. 3 Burr. 1688. 2 Blac. Rep. 1062. Say. Costs, 25. S. C. Cas. Pr. C. P. 137. *contra*.—5. This statute applies to a writ of inquiry, as well as a trial, where the damages are under forty shillings, 2 Str. 934.—6. And a justification found for the plaintiff will not, in that event, entitle him to full costs. Barnes, 128. Cas. Pr. C. P. 22. 2 Wils. 258. 4 East, 567.

(u) 1. By the 22 & 23 Car. 2. c. 9. (extended to Wales, and the counties palatine, by the 11 & 12 W. 3. c. 9.) it is enacted, that "in all actions of trespass, assault and battery and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit, than the damages so found shall amount unto."—2. It seems to have been the intention of the statute, that the plaintiff should have no more costs than damages, in any personal action whatsoever, if the damages were under forty shillings, except in cases of battery or freehold; and not even in these, without a certificate.—3. And this construction was adopted in some of the first cases that arose upon the statute. 2 Keb. 849. 3 Keb. 121. 247.—4. But a different construction soon prevailed: and it is now settled, that the statute is confined to actions of assault and battery; and actions for local trespasses, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question. T. Raym. 847. T. Jon. 232. 2 Sho. 258. S. C. 3 Mod. 39. 1 Salk. 208. 1 Str. 577. Gilb. Eq. Rep. 195. Barnes, 134. 3 Wils. 322. S. C. 1 H. Blac. 294. 2 East, 162, per Lawrence, J. 7 East, 328.—5. Therefore it does not extend to actions of *assumpsit*, debt, covenant, trover, 3 Keb. 31. 1 Salk. 208., false imprisonment, or the like.—6. Or to actions for a mere assault. 3 T. R. 391., but see 6 T. R. 562.—7. Or for criminal conversation. 2 Blac. Rep. 854. 3 Wils. 319. S. C.—8. Or battery of the plaintiff's servant, 3 Keb. 184. 1 Salk. 208. 1 Str. 192. *per quod consortium vel servitium amissit*.—9. In actions for local trespasses, the statute applies, wherever an injury is done to the freehold. 2 Vent. 48. Com. Rep. 19. 1 Salk. 208. 1 Str. 577. 633. 645. Gilb. Eq. Rep. 195. 2 Str. 726. 2 Ld. Raym. 1444. S. C. 6 T. R. 281.—10. Or to any thing growing upon, Bul. Ni. Pri. 330. Barnes, 144. 7 East, 325. or affixed to the freehold, Bul. Ni. Pri. 330. 1 Str.

[*]If a statute says, that if the damages be under 40s. the plaintiff shall not have judgment, but the defendant shall have costs; the jury ought to find for the defendant in such case. 5 Mod. 367.

The plaintiff shall not have more costs than damages in trespass for assault and battery; if the defendant be found not guilty as to the battery. R. 2 Lev. 102.

633. Cas. Pr. C. P. 86. Barnes, 121. 6 T. R. 281. 7 East, 325.—11. And in a modern case, it was carried still further. Doug. 779. and see 1 Str. 633. 645. Gilb. Eq. Rep. 197, [*]8. S. C. 3 Burr. 1282. Say. Costs, 50. S. C. accord. but see 2 Vent. 215. Skin. 66. Com. Rep. 19. 1 Salk. 208. 1 Str. 192. semb. contra.—12. In an action for mesne profits, if the plaintiff recover less than forty shillings damages, and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages. 1 Esp. Cas. Ni. Pri. 359. 6 T. R. 593.—13. And where, to a declaration in trespass, for throwing down, burning, and destroying the plaintiff's hedge or fence, affixed to the freehold, the defendant pleaded the general issue, and a justification of throwing down the hedge, under a right of common, which was found for him, and there was a verdict for the plaintiff, with twenty shillings damages, on the general issue; the court held, that the facts stated in the special plea could not be taken into consideration, to shew that the title to the freehold could not come in question; and as it might have been in issue on the declaration, and the judge did not certify, the plaintiff was entitled to no more costs than damages. 7 East, 325. *sed vide post*, 951, 2.—14. But in trespass for breaking and entering a free warren, the plaintiff shall have full costs, though the damages be under forty shillings. 2 Blac. Rep. 1151.—15. Where an injury is done to a personal chattel, it is not within the statute. 3 Keb. 389. 469. T. Jon. 232. 1 Salk. 208. 1 Str. 534. Gilb. Eq. Rep. 197. S. C.—16. Nor where an injury to a personal chattel is laid in the same declaration with an assault and battery, or local trespass. 3 Mod. 39. 1 Salk. 208. 1 Str. 192. 551. Gilb. Eq. Rep. 197. S. C. Barnes, 119, 20. 134. 3 Wils. 322. S. C. 2 Str. 1130. Say. Costs, 39.; but see 1 Esp. Cas. Ni. Pri. 255.—17. And consequently, in these cases, though the damages be under forty shillings, the plaintiff is entitled to full costs, without a certificate.—18. But then it must be a substantive and independent injury; for where it is laid or proved merely in aggravation of damages, as a mode or qualification of the assault and battery, or local trespass, 1 Str. 624., or there is a verdict for the defendant upon that part of the declaration which charges him with an injury to a personal chattel, it is within the statute. 2 Vent. 180. 195. Cas. Pr. C. P. 118.—19. So, where a *laceravit*, or tearing of the plaintiff's clothes, is laid in the declaration, or found by the jury, to be merely consequential to, Say. Rep. 91, 1 T. R. 655., or committed at the same time, 1 H. Blac. 291. 5 T. R. 482., as an assault and battery, the plaintiff, recovering less than forty shillings damages, is not entitled to full costs, without a certificate.—20. And in a late case, it was holden by the court of Common Pleas, that if the plaintiff declare in one count for assaulting him, and beating his horse on which he was riding, whereby it was injured, and the jury gave a verdict with general damages under forty shillings, the plaintiff shall have no more costs than damages. 1 Taunt. 357.—21. The certificate required by this statute, need not, it seems, be granted at the trial of the cause. 11 Mod. 198.—22. And where the defendant lets judgment go by default. Bul. Ni. Pri. 329.—23. Or justifies the assault and battery. 6 T. R. 562.—24. Or pleads in such a manner as to bring the freehold or title of the land in question on the face of the record, a certificate is holden to be unnecessary.—25. But the plaintiff in trespass *quare clausum fregit*, recovering less than forty shillings damages, is not entitled to costs of increase, merely because a view was granted before trial, though upon the application of the defendant. 11 East, 184. 1 Ld. Raym. 76. 2 Salk. 665. S. C. contra.—26. And where in an action for an assault and battery, the defendant justifies the assault only. 3 T. R. 391.; and see 1 Taunt. 16.—27. Or an assault only is certified by the judge, 2 Lev. 102. the plaintiff, recovering less than forty shillings, is not entitled to more costs than damages.—28. Though, in the latter case, to entitle him to full costs, the judge may certify, on the 8 & 9 W. 3. c. 11. that the assault was wilful and malicious. 3 Wils. 326.—29. The award of an arbitrator is not tantamount to a judge's certificate, under the 22 & 23 Car. 2. c. 9. 3 T. R. 138.—30. Therefore where a verdict was taken for 10/. in trespass, subject to an award of damages, and the costs were directed to abide the event, if the arbitrator find less than forty shillings damages, the plaintiff cannot have his costs, though it be also found that the trespass was wilful, and that the defendant should pay the plaintiff his costs; for costs being directed to abide the event, means the legal event; and the authority of a judge to certify for costs under the 22 & 23 Car. 2. c. 9. where the trespass is wilful, is not transferred to the arbitrator under such a rule of reference. 5 East, 489.—31. Where the plaintiff recovered less than forty shillings damages, and the plea or issue, though special, was collateral to the question of freehold or title to the land, as where the defendant justified an entry as bailiff under process, and issue was joined upon the doors

And the plaintiff shall have no more costs than damages, though the plaintiff joins several trespasses, and the defendant justifies all except the *clausum fregit*, if the justification be found for the defendant. R. 2 Vent. 180. 195.

Though the trespass be for breaking his close, and also putting stakes upon his soil. R. 2 Vent. 48.

Or breaking his close and his soil. Dub. 5 Mod. 74. R. Carth. 224, 5.

Or, breaking his close, and cutting down corn. Semb. 5 Mod. 315. Skin. 666.

Or, breaking his close, and cutting down his rails; for they are fixed to the freehold. Per Holt, Comb. 324.

Or, breaking his closes and pulling up and throwing down his hedges. R. Comb. 420.

Or, cutting down trees. R. 11 Geo. 1. C. B. Shepherd and Yard.

Nor, for trespass for assault and battery, and striking his horse, *per quod deterioratus fuit*, and not guilty, and damages generally, where no battery was certified. R. Pas. 11 Geo. in B. R. inter Clark and Otherey. 1 Str. 624.

Nor though an action for slander was commenced before the 21 Jac. if it was prosecuted after. R. Lat. 2. 58.

Or, commenced in an inferior court, and removed into C. B. by *habeas corpus*. R. in C. B. Tr. 12. Ann.

But the st. 21 Jac. 16. does not extend to an action for slander of a title. Per 3 J. Jon. 196. 1 Sal. 207. Cro. Car. 141.

Nor, to an action for words, actionable only in respect of special damage. R. 1 Sal. 206.

Nor, for words and procuring to be indicted. R. Cro. Car. 163. 307. R. cont. 2 Mod. Ca. 371.

And the st. 22 & 23 Car. 2. does not extend, where the jury gives costs to a sum certain more than the damages are. R. 2 Vent. 36. 1 Sal. 207.

[*]Nor, to a trespass, in which the title of the land does not come in question: as, in trespass for throwing down his stalls in a market. R. Ray. 487. 2 Jon. 232.

Nor to trespass and trampling *struem, anglice*, a hay rick. Dub. F, g. 42.

Or, killing his horse with a sword. Ray. 488.

Or, for entering his close and impounding his cattle. R. 3 Mod. 40.

Or, for entering his close and ploughing his soil. 5 Mod. 74. 316.

being shut. 2 Barnard. K. B. 277.—32. Or where, upon a plea of a distress for rent, there was an issue on the defendant's being bailiff, Say. Rep. 250. a certificate was formerly holden to be necessary to entitle the plaintiff to full costs: for it was considered, that a plaintiff who recovered less than forty shillings damages, in trespass *quare clausum fregit*, was not entitled to full costs, unless the freehold or title appeared to have come in question, either by the judge's certificate, or by the pleadings.—33. But it has since been determined, in several cases, 2 H. Blac. 2. 341. 7 T. R. 659., but see 7 East, 325. semb. contra. that if the defendant in trespass *quare clausum fregit*, plead a license or other justification which does not make title to the land, and it is found against him, the plaintiff is entitled to full costs though he do not recover forty shillings damages.—34. And the principle on which these determinations have proceeded is, that where the case is such that the judge who tries the cause cannot in any view of it grant a certificate, it is considered to be a case out of the statute. 7 T. R. 660.—35. So on a plea of not guilty to a new assignment of *extra viam*, the plaintiff obtaining a verdict for less than forty shillings damages, is entitled to full costs, without a judge's certificate. 2 Lev. 234. 2 Ld. Raym. 1444. 2 Str. 726. S. C. Id. 1168. Say. Rep. 251. 22 G. 3. K. B. Hul. Costs. 86. S. C. 1 East, 350., but see Barnes, 124. 129. S. C. Id. 149. Bul. Ni. Pri. 330. contra.—36. Unless the way pleaded be set forth by metes and bounds. 22 Geo. 3. K. B. Hul. Costs, 86. S. C. 1 East, 351.—37. And where the plaintiff is entitled to costs upon the new assignment, he is entitled to the costs of all the previous pleadings. 1 T. R. 636. Tidd, 946. 952.

Or, digging his turf, corn, &c. Semb. 1 Sal. 193.

Or, entering his boat. and cutting his rope. 5 Mod. 316. R. Comb. 324.

Nor, to a trespass with an *asportavit*, though the thing carried away be of small value. R. 2 Vent. 48. Acc. Skin. 666.

So, if he enters a close, and digs roots, and removes them to another place in the same close; for that is a carrying away. Per 2 J. Vent. cont. 2 Vent. 215.

So, in trespass *quod oves chasiavit & abduxit*; for that is a carrying away. Carth. 225.

So the st. 22 & 23 Car. 2. does not extend to a trespass where the defendant justifies, and it is found against him. R. 2 Lev. 234.

Where the action did not commence at Westminster, but is removed out of an inferior court. Semb. 2 Lev. 124. R. 4 Mod. 379.

Where the action is for disturbing his common. R. 2 Mod. 141.

Or, for chasing his sheep, &c. R. 1 Sal. 208.

Neither does it extend to debt, assumpsit, account, trover, detinue, &c. where the title to land cannot come in question. 1 Sal. 208.

Nor, to the battery of a servant, *per quod servitium amisit*. 5 Mod. 74. 1 Sal. 208.

Nor, by the st. 4 & 5 W. & M. 23. to trespass against an inferior tradesman for hunting, hawking, fishing, or fowling.

And every tradesman (x) seems to be intended by inferior tradesman. Pas. 9 W. 3. Bennet and Thalbois. 1 Sal. 212. (Reported Comyns's Rep. 26.) (y)

Nor, by the st. 8 & 9 W. 3. 11. to a trespass which appears at the trial, and is certified by the judge upon the record, to be wilful and malicious. (z)

[*]And though the st. 22 & 23 Car. 2. says, the judgment shall be void, it shall not be avoided by plea. 2 Vent. 36.

(A 4.) By an avowant.

By the st. 7 H. 8. 4. an avowant, or he who makes conusance in replevin, or second deliverance for rent, custom or service, if it be found for him, or the plaintiff be barred, shall recover damages and costs, as the plaintiff should have done if he had recovered.

(x) A clothier is. Barnes, 125.

(y) 1. Barnes, 125. Ld. Raym. 149.—2. But this doctrine was afterwards questioned. 2 Wils. 70. Say. Costs, 54.—3. In trespass for hunting, laid upon 4 & 5 W. & M. against the defendant as a dissolute person, &c. if the plaintiff prove the trespass, but not the circumstances under the statute, he shall nevertheless recover as in a common action of trespass. 2 Blk. 900.

(z) 1. The certificate required by this statute, need not be granted at the trial of the cause. E. 22 Geo. 3. C. P. 1 T. R. 636. 6 T. R. 11. 7 T. R. 449. K. B. but see 2 Wils. 21. Doug. 180. n. contra.—2. And if it appear on the trial, that the trespass, however trifling, was committed after notice, and the jury give less than forty shillings damages, it has been usual for the judge to consider himself bound to certify that the trespass was wilful and malicious, in order to entitle the plaintiff to his full costs. 6 T. R. 11., and see 7 T. R. 449.—3. The granting of a certificate however, upon this statute, seems to be discretionary in the judge before whom the trial is had, who may certify or not, according as it appears to him, under the circumstances proved, that the trespass was wilful and malicious.—4. And the judge having declined to certify, in a case where notice was given by the plaintiff's wife to the defendant not to enter the *locus in quo* in his cart, there being no road there, notwithstanding which the defendant persisted in going on, in the exercise of a disputed right of common in an adjoining inclosure of the plaintiff, which right was found for the defendant on a justification pleaded, the court refused to interfere. 3 East, 495. H. 43 Geo. 3. K. B. Tidd. 954, 955.

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So, by the st. 21 H. 8. 19. he who avows, &c. for damage-feasant, or other rent.

And, by equity, if he avows for an amerciament in a court leet, or baron. R. Mo. 893. R. 2 Cro. 520. R. cont. Cro. El. 300. Dub. Cro. Car. 534. Semb. 2 Rol. 75. Court divided, Jon. 422. 434. Cont. per Holt, Carth. 179.

Or, for a fine in a court leet. R. Mo. 893.

Or, for an estray. Dub. Ow. 13. Cro. El. 258, 329. Acc. 2 Cro. 520.

Or, for a heriot. 2 Cro. 28.

Or, for a relief. Dub. 2 Cro. 28. Jon. 422.

Or, for the penalty of a bye-law. Per 2 J. Jones cont. Cro. Car. 534. Jon. 421.

And the avowant shall have costs, though judgment be against the plaintiff upon demurrer. R. 2 Cro. 520.

Or the plaintiff be nonsuited. M. 13 W. 3. inter Smith and Walgrave. (Reported Comyns's Rep. 122.)

So, if an executor avows by force of the st. 32 H. 8. 37. though it be a subsequent statute to 21 H. 8. 19. R. 2 Rol. 457.

So, though several issues be joined upon the avowry, and some found for, and some against him, and the plaintiff has not costs for the issues found for him. R. 2 Cro. 473. Dub. 2 Rol. 37. R. acc. 2 Rol. 140.

But if a defendant in replevin pleads in abatement, and avows for a return, and has judgment, that the plea shall abate, and for a return; he shall not have costs. R. M. 13 W. 3. B. R. inter Smith and Walgrave. (Reported Comyns's Rep. 122.) (a)

If he pleads property. Hard. 153. (b)

[*](A 5.) By a tenant, or defendant.—In an action.

By the st. 23 H. 8. 15. if a plaintiff be nonsuited, or have verdict against him in an action upon the st. 5 R. 2. in debt, or covenant on specialty made to the plaintiff, or on a contract with the plaintiff, in detinue if property be alleged in the plaintiff, in account against a bailiff or receiver to the plaintiff, in an action on the case, or on a statute for a personal wrong or offence to the plaintiff, the defendant shall have costs.

So, if judgment be against the plaintiff upon demurrer. R. 1 And. 117. Vide infra.

And by the st. 4 Jac. 3. in trespass, ejectment, or other action, where plaintiff should have had costs if he had recovered. (c)

(a) 2 Ld. Raym. 788.

(b) 1. And by the 11 Geo. 2. c. 19. s. 22. if the defendant avow, or make cognizance in replevin, upon a distress for rent, relief, heriot, or other service, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover double costs of suit.—2. But this statute does not extend to a rent-charge. Willes, 429. 1 Bos. & Pul. 214.—3. Or seizure for a heriot custom. Barnes, 148. 2 Wils. 28. Bay. Costs, 107.—4. And where by a canal act, the company were authorized to take certain lands for the purposes of the act, on making certain payments, either by annual rents or sums in gross; and the persons from whom the land was to be taken, were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums; an avowant, stating a distress under this act of parliament, was holden not to be entitled, on obtaining a verdict, to double costs under the statute 11 Geo. 2. c. 19. s. 22. 7 T. R. 500.; and see 1 Bos. & Pul. 213. S. P. Tidd, 963.

(c) Vide Gilb. C. P. 271. that it does not extend to suits by executors or administrators.

So, by the st. 8 El. 2. (d) & 13 Car. 2. 2. if the plaintiff be nonsuited for want of declaration, or afterwards discontinue, or be nonsuited.

So, by the st. 4 Geo. 2. 28. if in any ejectment the plaintiff be nonsuited, unless for want of confessing lease, entry, and ouster.

So, by the st. 8 & 9 W. 3. 11. if judgment be against the plaintiff or defendant upon demurrer (e) in bar. R. 1 Sal. 194. Mod. Ca. 88.

Or the plaintiff in prohibition, *scire facias*, debt upon st. 2 Ed. 6. 13. or in waste, be nonsuited, discontinues, or has a verdict against him.

So, by the st. 4 & 5 W. & M. 18. an informer, if a verdict be against him, or a *nolle prosequi* entered by him, shall pay costs; unless the judge on the trial certify there was a probable cause for the information. Vide post, (A 6.)

And therefore now, in all cases where the plaintiff would have costs if he had recovered, the tenant or defendant shall have costs if the plaintiff be barred, or nonsuited.

If he be barred upon a special, as well as upon a general verdict. R. Cro. El. 465.

Or, discontinue after a special verdict. Dub. Cro. Car. 575.

And this, since the st. 4 Jac. 3.—But not upon the st. 23 H. 8. 15. if the action be not for a personal wrong or offence. 2 Leo. 9. 52. 3 Leo. 68.

As, in an action upon the case generally, or in an action upon a statute.

In *warrantia chartæ*. Semb. 3 Lev. 322.

So the defendant shall have costs, where the plaintiff would be entitled to costs generally in the same action, though he would not have had them in that particular case: as, if the plaintiff be nonsuited in an action for words, which are not actionable. R. Hut. 16. Hob. 219.

[*]So, if the plaintiff be nonsuited, &c. but the declaration is insufficient. R. 2 Rol. 88. 213. R. Cro. Car. 175. Cont. Cro. Car. 545, where a verdict was for the plaintiff, and judgment arrested for a fault in the declaration.

So, if the plaintiff be nonsuited at *nisi prius*, &c. though the plea of the defendant be insufficient. R. Mo. 625.

Or, enters a *nolle prosequi*, or *retraxit*. Dub. Hard. 152.

So a defendant, being an executor, or administrator, shall have costs; though a plaintiff executor or administrator does not pay costs. R. Cro. El. 503.

So a defendant shall have costs where the plaintiff sues as executor, or administrator, if it be for a wrong to himself, or upon his contract; as, in trespass or trover for goods of the testator taken out of the possession of the executor himself. Hut. 79. R. Cro. Car. 219. Jon. 241. R. Lat. 220. R. cont. per totam Curiam, 3 Lev. 60. R. acc. in C. B. 6 Ann. inter Hunt and Ballow, (cited Comyn's Rep. 163.) R. Sav. 133, 4. Vide post, (A 7.)

In ravishment of a ward out of the custody of the executor. Dub. Cro. Car. 29. Hut. 79. Cont. 3 Lev. 60.

(d) 1. If plaintiff enter a *nolle prosequi*, defendant is entitled to costs upon this statute. 3 T. R. 511.—2. But it does not extend to suits by executors or administrators. Cro. Eliz. 69. Cro. Jac. 361.

(e) 1. This statute does not extend to demurrers to pleas in abatement. 1 Ld. Raym. 337. 1 Salk. 194. 12 Mod. 195. Comb. 482. S. C. 2 Ld. Raym. 992. 1 Salk. 194. 6 Mod. 88. S. C.—2. Nor any action, wherein the defendant would not have been entitled to costs, upon a nonsuit or verdict. Cas. Pr. C. P. 25. 1 H. Blac. 530.; but see Cas. Pr. C. P. 4. contra.

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In debt for rent upon a lease by the executor, of a term of the testator. Hut. 79.

In account against one as his receiver. Semb. Bend. pl. 28. R. Dal. 93.

In trover for goods of which his testator died possessed, and which afterwards came to the hands of the defendant by finding, though he does not allege any possession in himself; for the finding was in his time, and he might have had the action in his own name. R. Jon. 241. R. 1 Vent. 109. R. in C. B. P. 8 Ann. inter Hole and King, (reported Comyns's Rep. 162.)

So, where the plaintiff in ejectment declares upon the demise of an executor, and is nonsuited; for the action is his proper action, and he is bound by the rule. Per C. B. M. 5 Ann.

In an *indebitatus assumpsit* for money received to the use of the plaintiff as executor, or administrator. R. 1 Sal. 207. Cont. Semb. 1 Sal. 314. R. acc. Mod. Ca. 91. 181.

So, in trover by an administrator for goods of the intestate taken after his death, and before administration. R. 1 Vent. 109. R. in C. B. M. 9 Ann. Adm. 1 Sal. 314.

So, if the plaintiff sues as executor *de son tort*. Lit. 5.

So an executor shall pay costs for not proceeding to trial upon notice. 1 Sal. 314.

So now, by the st. 8 & 9 W. 3. 11. in trespass, assault, false imprisonment or ejectment against several. if one or more defendants be acquitted by verdict, they shall have costs, as if the verdict had been against the plaintiff as to all; unless the judge at the trial immediately certify on the record, that there was a reasonable cause to make them defendants. (f)

[*] But if the plaintiff be nonsuited for a fault in the declaration, though divers defendants appear severally, they shall have only costs for one. (g)

So, in an information, if one defendant be (h) acquitted, he shall not have costs, though the judge does not certify. R. 1 Sal. 194. (i)

(f) 1. This statute is confined to the particular actions therein mentioned; and does not extend to an action of trespass upon the case. 2 Str. 1005.—2. Nor consequently to an action of trover. Barnes, 139.—3. Neither does it extend to an action of replevin. 3 Bur. 1284. 1 Blac. Rep. 355. Say. costs, 215. S. C.—4. Nor to an action of debt or bond against executors, one of whom is acquitted on the plea of *plene administravit præter*. E. 42 Geo. 3. K. B. Tidd. 974.

(g) 1. Plaintiff may pay costs to which of them he pleases. 1 Str. 516. 2 Str. 1203.—2. And if several defendants fail, each is answerable for the whole costs. B. N. P. 335, 6.

(h) 1. Where one of several defendants lets judgment go by default, and the other pleads a plea which goes to the whole declaration, and shews that the plaintiff had no cause of action, if this plea be found for the defendant who pleaded it, he shall have costs; and being an absolute bar, the other defendant shall have the benefit of it, and shall not pay costs to the plaintiff. Co. Lit. 125. Cro. Jac. 134. 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C. 2 Ld. Raym. 1372. 1 Str. 610. 8 Mod. 217. S. C. Cas. Pr. C. P. 107. Pr. Reg. 102. S. C. 2 H. Blac. 28.—2. But where the plea does not go to the whole, but is merely in discharge of the party pleading it, there the other party shall not have the benefit of it; but shall pay costs, though it be found against the plaintiff. See the cases referred to, *supra*. 1 Wils. 89. 3 T. R. 656. Tidd, 973.—3. And if two defendants in an action for a tort, plead not guilty, jointly, and one of them is found not guilty, he is entitled to costs. Brown v. Stearns, 13 Mass. Rep.—4. If two defendants plead severally, where they may and ought to plead jointly, they shall not have several costs. Ward v. Johnson, 13 Mass. Rep. 148. }

(i) 1. Many cases have occurred in both courts, independently of the statute 4 Ann. c. 16. in which the question has been made, whether a defendant is entitled to any costs, where, there being several counts in a declaration, the plaintiff has obtained a verdict upon one only.—2. And it has been uniformly holden, that in such case costs shall not be taxed for the defendant, on such counts as may have been found for him, not only in cases where the substantial cause of action is the same in all the counts, and only varied by the manner of stating it, 2 Blac. Rep. 800. 1199., but also where, to different counts of a declaration, there have been different pleas, and issues on those pleas, and one or more of the issues have been

[*]So, in debt upon the st. 2 & 3 Ed. 6. 13. if the plaintiff be nonsuited, or has a verdict against him the defendant shall not have [*]costs; for it is

found for the plaintiff, and the rest for the defendant.—3. In such case it has also been determined, that the defendant shall not have costs taxed on the issues found for him.—4. And the practice appears to have been settled in both courts, that wherever a plaintiff succeeds on a trial, as to any part of his demand, divided into different counts in his declaration, whether the defendant has pleaded one plea to all the counts jointly, or pleaded to them separately, and separate issues have been joined, on some of which he has succeeded, yet he has never been allowed costs on that part of the plaintiff's demand, which has been found against the plaintiff. 5 East, 265.—5. There was formerly a distinction, as to the costs on several counts, between the practice of the two courts: for in the King's Bench, when the declaration consisted of several counts, the plaintiff was only entitled to the costs of such as were found for him; and neither party was allowed the costs of those which were found for the defendant. Say. Costs, 212. Doug. 677. 6 T. R. 602, 3. 5 East, 262, 3. 2 Bos. & Pul. 50. b., but see 1 Wils. 331.—6. But it was otherwise in the Common Pleas: for there, if the plaintiff succeeded upon any one of the counts, he was entitled to the costs of his whole declaration, though the defendant succeeded upon the others. Bul. Ni. Pri. 335. 2 Blac. Rep. 800. 1199. 6 T. R. 602, 3. 5 East, 262, 3. 2 Bos. & Pul. 49., but see the case put by Le Blanc, J. 8 T. R. 467.—7. This distinction however, is now abolished; and it is settled in both courts, that neither party is entitled to costs, on those counts which are found for the defendant. 2 Bos. & Pul. 334.; and see Chitty on Pleading, chap. iv. p. 395.—8. So where the defendant pleaded several justifications to two counts, for different trespasses in different places, and on the trial all the issues were found for him, except an issue on not guilty to a new assignment, which was found for the plaintiff; the court on argument held that the plaintiff was entitled to one penny damages and one penny costs, the jury having found the verdict for him with one penny damages, and that the defendant was not entitled to any costs. Barnes, 149.—9. So where the defendant in trespass pleaded three different justifications to three different counts, and on issue joined in the Common Pleas, had a verdict for him on two, and against him on the third; on motion, this was holden not to be a case within the act, and that the plaintiff was entitled to costs at common law on the whole declaration. Bul. Ni. Pri. 335.—10. So where a declaration, in an action on the case, contained one count in trover, and another for words, and the defendant pleaded not guilty to the first count, and a justification to the second count, and there was a verdict for the plaintiff on the count in trover, and for the defendant on the other count, the court held that the defendant should not have costs taxed on the issue found for him; and Buller J. said, the practice of the court is uniform, not to allow the defendant costs in cases of this sort. Doug. 677.—11. So where the defendant pleads *non assumpsit* as to all but a particular sum, and as to that sum a tender; and on the trial, the fact of the tender is found for him, but that the sum tendered was not sufficient, by which the plaintiff has a verdict on the general issue, and judgment for his damages and costs; in such case, there is not an instance of the costs of the issue, on the plea of tender, ever having been taxed for the defendant. 5 East, 262.—12. And accordingly in a late case, where in *assumpsit* against an executrix, the defendant pleaded the general issue and the statute of limitations to the whole declaration, and as to a particular sum that the promises were made by the defendant's testator and one A. B. jointly, which A. B. survived the testator, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs; the court, after a full investigation of the subject, held that the defendant was not entitled to have the costs of the issue found for her deducted from the costs of the trial, which the plaintiff was entitled to on the issues found for him. 5 East, 261.—13. The same rule has prevailed, where a defendant has succeeded on a demurrer, as to part of the plaintiff's demand. 5 East, 264.—14. Thus, where the declaration consisted of two counts, and the defendant demurred to one, and obtained judgment thereon, and pleaded to the other, and on trial of the issue, there was a verdict for the plaintiff; the court held, that the plaintiff was entitled to costs upon his verdict, and the defendant to none upon his demurrer: for that the plaintiff having prevailed upon one of his counts, had a right to have his costs upon that count, without any deduction on account of the defendant's having got judgment upon his demurrer to the other count. 2 Burr. 1232. Say. Costs, 211. S. C. but differently reported. *Tamen quare*; and see stat. 8 & 9 W. 3. c. 11. s. 2.—15. But if there be two distinct causes of action in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count. 3 T. R. 654. and see 6 T. R. 602, 3.—16. So where the declaration in trespass consisted of one count only, to which there were several pleas of justification, on which issues were taken, and a new assignment, on which

not a debt by specialty or contract, or for a personal wrong to the plaintiff; and therefore it is not within 23 H. 8. 15. 2 Inst. 651. (k)

judgment passed by default, and a *rente* was awarded, as well to assess the damages on the judgment by default, as to try the issues; all the issues being found for the defendant, it was holden that he was entitled to the costs of them. 8 T. R. 466., and see 5 East, 265.—17. And in like manner, where one of the issues in a similar case was found for the defendant, he was holden to be entitled to the general costs of the trial, though another issue was found for the plaintiff. 13 East, 191.—18. But where the defendant in trespass *quare clausum fregit*, pleaded not guilty, and also a justification under a right of way, and the plaintiff traversed the right of way, and new assigned *extra viam*; and issue was taken, as well on the new assignment, as on the right of way; after verdict for the plaintiff, with one shilling damages on the new assignment, and for the defendant on the justification, the plaintiff was holden to be entitled to full costs, deducting only the defendant's costs on the issue found for him. 1 East, 350. 13 East, 194. a.—19. An inclosure act directed, that the parties who were dissatisfied with the determination of the commissioners might bring actions to try their rights, adding, "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff, and if against such determination, then by the proprietors at large." A proprietor brought an action, claiming nine distinct rights, and recovered for three only, and the court held, that he should only have his costs on those issues which were found for him, and that the defendant should have his costs of the other issues. 6 T. R. 599.—20. It should be remembered, however, that the plaintiff has in no case a right to costs, except where he is entitled to judgment on the whole record.—21. And therefore where the defendant, in trespass for breaking and entering the plaintiff's free fishery in A. and also in B., and also in A. and B., pleaded first not guilty, and secondly, that the said free fisheries were parcel of a navigable harbour, &c. common to all the king's subjects; to which the plaintiff replied, prescribing for a free fishery in the said place, in right of his manor; and the defendant rejoined, taking issue on such prescription: it was holden, that on verdict for the plaintiff on the general issue and for the defendant on the prescription, the latter going to the whole declaration, the plaintiff was not entitled to costs. 11 East, 263.; Tidd. 957, 962.

(k) 1. And for the more effectual prevention of frivolous and vexatious arrests and suits, it is enacted by the statute 43 Geo. 3. c. 46. s. 3. that "in all actions to be brought in England or Ireland, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such actions shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought; provided that it shall be made appear, to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount as aforesaid, and provided such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant or defendants: and the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed the amount of the taxed costs of the defendant or defendants in such action: and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant or defendants, to be taxed as aforesaid, that then the defendant or defendants shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action, from the amount of his or their costs so to be taxed as aforesaid, to take out execution for such costs, in like manner as a defendant or defendants may now by law have execution for costs in other cases."—2. Upon this statute, the defendant was allowed his costs, where the plaintiff arrested him for the price of coals, considered as full measure; the plaintiff having, previously to the arrest, compounded a penal action for delivering the same coals, as being short of measure. 2 Smith, R. 261.—3. And where a verdict was taken at the trial for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs were directed to abide the event of the award, and the arbitrator found a less sum to be due to the plaintiff than that for which the defendant was arrested; the court held that the sum so found, and for which judgment was afterwards given, was to be considered as a sum recovered, within the meaning of the act, so as to entitle the defendant to apply for costs. 44 Geo. 3. K. B. 44 Geo. 3. S. P.—4. But this statute does not extend to an action of debt on bond, where the plaintiff obtains a verdict for nominal damages, and takes his judgment for the penalty, exceeding the sum for which the defendant was arrested. 10 East, 525.—5. And, in the King's Bench, it has been holden not to apply to cases where the defendant pays into court, upon the common rule, a less sum than he was arrested for, and the plaintiff takes it out of court.

If the defendant recovers costs he may have execution for them by *capias ad satisfaciendum*. R. 2 Cro. 595.

And though judgment be afterwards reversed ; the costs shall not be refunded. Per 2 J. Englefield cont. Dy. 32. a. Mo. 625.

(A 6.) In an information.

So by the st. 18 El. 5. (l) the defendant in an information shall have costs, if the informer delays his suit, discontinues, be nonsuited, or the [*]trial or matter pass against him by verdict, or judgment against him in law. (m)

Though he be not a common informer, (unless when he is the party grieved.) R. 4 Leo. 55. R. 1 And. 116.

Though the information be upon a penal statute made since 18 El. R. Hut. 35.

Though the informer obtains a verdict, if judgment be against him, for that the statute upon which the information is founded was repealed, or expired. Semb. Hut. 36, but the court divided.

If judgment be against the informer upon a demurrer, or special verdict. Per 3 J. Hut. 36.

So, in all cases, where the cause passes against the informer for want of matter or form. Per 2 J. but the others cont. Hut. 36.

So, by the st. 4 & 5 W. & M. 18. the clerk of the crown in B. R. shall not file an information, &c. before a recognizance given of 20*l.* to prosecute, &c. and if a verdict pass for the defendant, or a *nolle prosequi* be procured, to pay costs taxed in three months after demand ; unless the judge certify there was cause for the information.

But the st. 18 El. 5. s. 5. allows any grieved by maintenance, champerty, buying titles or embracery, to sue on the statutes for such offences.

And it does not extend to officers of record, who in respect of office have used to exhibit informations, or sue on penal statutes.

Nor to officers informing for matters only concerning his or their offices.

So, if one defendant be found guilty, though the other be acquitted, he shall not have costs. Sal. 194. Vide ante, (A. 5.)

So, where the information is by the party grieved, the defendant shall not have costs. 4 Leo. 55. R. 2 Leo. 116. R. Sav. 50. 1 And. 116.

As, in an information for perjury. Semb. Cro. El. 177. 1 Brownl. 66.

If a verdict be against an informer upon a fault in pleading, no costs : as,

1 Smith, R. 428. 2 Smith, R. 667. 13 East, 90.—6. Though it seems to be otherwise in the Common Pleas. 2 New Rep. C. P. 76. and see 13 East, 90.—7. An application for costs under this statute, cannot be supported by a reference to the notes of the judge, before whom the cause was tried ; but an affidavit must be made, shewing there was no reasonable or probable cause for the arrest. 1 Taunt. 60.—8. And the court will not make an order for costs to be paid to the defendant upon this statute, where it appears, on shewing cause, that under the circumstances, the plaintiff had a reasonable or probable cause for arresting the defendant, to the full amount of the sum for which he was arrested. 1 Smith, R. 521. Tidd, 970. 972.

(l) Made perpetual by 27 Eliz. c. 10.

(m) 1. This act of parliament, which seems to give costs upon arrest of judgment. Gilb. C. P. 271. but see Hul. Costs, 203.—2. Extends to actions brought upon a subsequent statute. Willes, 392. 440. 1 Wils. 177.—3. Or one that is repealed. Hut. 35, 6. 2 Keb. 106.—4. And also to actions *qui tam*, for part of a penalty, as well as where the whole is given to a common informer. Cowp. 366. Say. Costs, 75. S. C. and see 2 Str. 1103. 6 Vin. Abr. 341, 2 S. C.—5. But it does not extend to actions brought by the party grieved, upon a remedial statute. 1 And. 116. 2 Leon. 116. 4 Leon. 55. Cro. Eliz. 177. Hut. 22. 1 Salk. 30. Tidd, 972, 973.

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if an information be for not inclosing a wood within a month after cutting it down; and alleges the cutting on the 10th of April, and that it lay open till the second of May, which is not a month. R. Hut. 35.

(A 7.) When a defendant shall not recover costs. Vide ante, (A 6.)

But a defendant shall not have costs, if the plaintiff discontinues his original. R. 1 Leo. 105.

Or enters a *nolle prosequi* after issue; for it is a bar to another action, and therefore differs from a nonsuit. Dub. Hard. 153.

If the plaintiff be nonsuited in an assise; for the statute does not extend to an assise. 1 Brownl. 28, 9.

[*]So he shall not have costs, if a repleader be awarded. 2 Vent. 196. R. Mod. Ca. 2.

So the defendant shall not have costs, where the plaintiff in an action of the like nature shall not have costs, if he recovers; as, in an attain. R. Cro. Car. 542. Jon. 432.

In an action upon a penal statute by *qui tam*, &c. R. Hut. 22. 1 Brownl. 66.

So a defendant shall not have costs, if the plaintiff, being an infant, sues by guardian. R. Cro. El. 33.

If a plaintiff, being executor or administrator, sues merely in the right of his testator, &c.; for the st. 23 H. 8. 15. extends only to an action upon a contract or wrong to the plaintiff himself; and the stat. 4 Jac. 3. enlarges costs as to more actions, not against more persons. R. Hut. 69. D. Cro. El. 503. R. Yel. 168. Dal. 96. Bend. pl. 28. R. 2 Rol. 87. (n)

(n) 1. Executors and administrators are not particularly excepted out of the statute. 23 Hen. 8. c. 15.—2. Yet as that statute only relates to contracts made with, or wrongs done to the plaintiff. 2 Str. 1107.—3. It has been uniformly holden, Cro. Eliz. 503. Cro. Jac. 279. 2 Bulst. 261. 1 Salk. 207. 314. 3 Bur. 1586. Say. Costs, 97. that they are not liable to costs, upon a nonsuit, T. 26 Geo. 3. K. B. or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right.—4. As upon a contract entered into with the testator or intestate. T. Jon. 47. 1 Vent. 92. 2 Ld. Raym. 1414. 1 Str. 682. S. C. Cas. Pr. C. P. 157. Pr. Reg. 118. S. C. Barnes, 141. 1 H. Blac. 528. 1 Bos. & Pul. 445. 2 Bos. & Pul. 253. 2 East, 395. E. 42 G. 3. cited in 2 East, 398.—5. Or for a wrong done in his life-time. Barnes, 129.—6. But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a contract, express or implied. 6 Mod. 91. 181. 1 Salk. 207. S. C. 1 Ld. Raym. 436. 1 Str. 682. Barnes, 119. 2 Str. 1106. 4 T. R. 277. 5 T. R. 234. 2 East, 396.—7. Or in trover, for a conversion after the death of the testator or intestate. Com. Rep. 162. Cas. Pr. C. P. 61. Barnes, 132. Cas. temp. Hardw. 204. 7 T. R. 358. M. 41 G. 3. K. B. 10 East, 293. 2 Taunt. 116. but see 3 Lev. 60. semb. contra.—8. And where a declaration in trover by an executor consisted of two counts, one on a conversion in the life-time, and another after the death of the testator, for which latter the plaintiff might have declared in his own right, he was holden to be liable to costs on a nonsuit. 2 Taunt. 116. and see 7 T. R. 358.—9. The reason why an executor, suing in his representative character, shall not be liable to costs, if he fail, is because he is supposed not to be cognizant of the contracts made by his testator; but as he must be cognizant of all contracts made by himself personally, though in his representative character, and as he might declare upon them in his own right, there is reason why he should not be exempt from costs, in case he fail in his action. 6 East, 412. per Lawrence, J.—10. And for a similar reason, executors or administrators are not necessarily exempted from costs on interlocutory motions. Per Cur. M. 42 Geo. 3 K. B.—11. But though an executor or administrator, necessarily suing as such upon a contract entered into with the testator or intestate, is not made liable to costs by the statute, and no costs can be awarded against him on record; yet in a late case, where the plaintiff sued as administrator, upon a contract made with his intestate, and assigned by the plaintiff to J. S. for whose benefit the action

[*]As, in an action for goods taken away in the life of the testator. Hut. 79.

In debt upon an obligation to the testator; though the defendant pleads *non est factum*, and it is found for him. R. 2 Cro. 229.

Or, pleads payment to the executor himself, and it is found so. R. 1 Vent. 92.

So, in an action for an escape of a person in execution to the testator. R. 1 Rol. 63.

Or, in execution upon his suit as executor. R. 2 Cro. 361.

So, in *assumpsit* upon a *computasset* with the testator. R. 2 Jon. 47. R. 1 Sal. 207. 314.

Or, with the executor himself for money of the testator. R. 2 Jon. 47. 2 Lev. 165. 3 Lev. 60. 1 Sal. 208.

So, in trover for money of the testator out of his own possession. Vide ante, (A 5.) cont. Acc. per Holt, 1 Sal. 208.

In trover for goods of the testator which he lost in his life-time, though the conversion be alleged in the time of the executor. R. in C. B. 6 Ann. inter Hunt and Ballow, per Holt. 1 Sal. 208. (Cited Comyns's Rep. 163.)

So the defendant shall not have costs, if the plaintiff executor or administrator be nonsuited within the st. 8 El. 2. R. Cro. El. 69.

Or, if an executor or administrator brings error upon a judgment against his testator, or himself. Vide post, (B.)

If the plaintiff takes administration when there was an executor living. R. Lit. 5.

If the plaintiff sues as executor, and upon issue, that he was not executor, it be found for the defendant. R. 1 Brownl. 79.

So the defendant shall not have costs by the st. 8 & 9 W. 3. 11. if judgment be for him upon demurrer to his plea in abatement. R. 1 Sal. 194.

So the defendant shall not have costs by the st. 23 H. 8. 15. if the plaintiff be admitted *in forma pauperis*.

Nor, by the st. 24 H. 8. 8. if the plaintiff sues upon a recognizance, specialty, or contract to the use of the king.

But if there be a plaintiff *in forma pauperis*, the court may tax costs, which the plaintiff shall pay or be whipped. 1 Sid. 261. 2 Sal. 506.

And he shall be dispaupered, where he has an estate, though he owes the value. Per Holt, Sal. 507.

If the jury gives costs where they ought not to be, the court shall give judgment without respect to the costs. R. 2 Sand. 257.

Though the plaintiff does not release the costs. R. 2 Sand. 257.

was brought, and it appeared in evidence that the contract had been annulled, with the privity both of the plaintiff and J. S., and the former was indemnified by the latter; a verdict being found for the defendant, the court of Common Pleas made a rule upon the plaintiff, to pay the defendant his costs, as for a contempt, in fraudulently abusing the process of the court. 3 Bos. & Pul. 115.—12. An executor or administrator is liable to costs, upon a judgment of *non pros*. Cas. Pr. C. P. 14. 157, 8. 3 Burr. 1585. 6 T. R. 654.—13. And where he has knowingly brought a wrong action, or otherwise been guilty of a wilful default, he shall pay costs upon a discontinuance. Cas. Pr. C. P. 79. 3 Burr. 1451. 1 Blac. Rep. 451. S. C. 2 New Rep. C. P. 72.—14. Or for not proceeding to trial according to notice. Cas. Pr. C. P. 157, 8. Pr. Reg. 119. S. C. Barnes, 133. 3 Burr. 1585. 1 H. Blac. 217.—15. But otherwise he is not liable to costs, in either of these cases. 2 Str. 871. Barnes, 133. 4 Burr. 1927. Say. Costs, 96, 7. S. C. Per. Cur. T. 44 Geo. 3 K. B. H. 45 Geo. 3 K. B. 2. Smith, R. 260. S. C.—16. Nor where he merely sues *en autre droit*, is he liable to costs, upon a judgment as in case of a nonsuit. 4 Burr. 1928. Per Cur. T. 37 Geo. 3 K. B. Barnes, 130. 2 H. Blac. 277. 2 East, 396. Tidd, 964. 966.

[*](B) COSTS IN ERROR.

By the st. 3 H. 7. 10. confirmed by the st. 19 H. 7. 20. if tenant, defendant, or other bound by judgment, sue a writ of error in delay of execution, and discontinue it, be nonsuited, or have judgment affirmed, he shall pay costs and damages at the discretion of the justices.

And if the judgment be affirmed, &c. the defendant in error shall have costs, though costs were not recoverable in the first action (o) : as, in a *quare impedit*. Dy. 77, a. R. Cro. Car. 145. 175.

In a *quod permittat* for abating a nuisance. R. Cro. El. 659.

So the defendant in error shall have costs, though the error be in the exchequer, upon the st. 27 El. 8. Cro. El. 588. (p)

(o) 1 Str. 262. 2 Str. 1084. See vide Cro. Car. 425. 1 Lev. 146. 1 Vent. 38. 166. 4 Mod. 245. Carth. 261.

(p) 1. Executors and administrators are liable to costs in error, in cases where they would be liable in the original action. 1 H. Blac. 566. and see 2 Str. 977.—2. But these statutes are confined to judgments recovered by the original plaintiffs below, and affirmed in error, and do not extend to judgments recovered by the defendants below.—3. Therefore, an avowant in replevin for rent in arrear, for whom judgment was given below, which was affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered by the judgment. 10 East, 2.—4. On a writ of error returnable in the King's Bench, that court, on motion, will order the master to compute interest on the sum recovered, by way of damages, from the day of signing final judgment below, down to the time of affirmance, and that the same be added to the costs taxed for the plaintiff in the original action. Doug. 752. n. 3. and see 2 Str. 931. 2 Bur. 1096, 7. 1 Blac. Rep. 267, 8. S. C. 2 T. R. 79.—5. In the Exchequer-chamber, though the court, it seems, are bound to allow double costs to the defendant in error, on the affirmance of a judgment after verdict in the King's Bench, yet it is entirely a matter in their discretion, whether or not interest shall be allowed on such affirmance. 2 H. Blac. 284.—6. And accordingly, the course is said to be for the officer to settle the costs, unless any particular direction be given by the court; and in taxing them, he allows double the money out of pocket or thereabouts, but adds no interest as a matter of course. 2 Bur. 1096.—7. In trover for bills of exchange, the court of Exchequer-chamber allowed interest from the time of the first judgment, upon all such bills as had been received before the judgment, and upon all such as were received afterwards, from the receipt of them. 2 New Rep. C. P. 205.—8. And interest was allowed in a late case, in an action for not giving a bill of exchange in payment for goods sold, from the time when the bill, if given, would have become due. 2 Campb. 428. n. and see 13 East, 98. 3 Taunt. 157.—9. But the practice of the Exchequer-chamber seems now to be, to give interest only in cases where interest was recoverable below. Ibid.—10. Unless it be distinctly proved, or admitted, that the writ of error was brought for delay. 3 Taunt. 51.—11. And therefore, though they once allowed interest in an action of *lost*. 2 H. Blac. 267.—12. And in an action on an attorney's bill. Id. 284.—13. Yet these decisions were afterwards disapproved of, and interest was refused in the latter action. 2 Bos. & Pul. 219.—14. And it is said to be contrary to the practice of the court, to give interest in an action for mere unliquidated damages. 3 New Rep. C. P. 360. and see 1 Campb. 518. 2 Campb. 428. n.—15. Where the case requires it, interest is allowable in the Exchequer-chamber, on a judgment of *nonpross*, as well as on a judgment of affirmance. 1 Bos. & Pul. 29.—16. And where interest is allowed, it is calculated at the rate of 5*l.* per cent. Id. 30.—17. But in debt on recognizance, against bail in error in the Exchequer-chamber, the bail are not liable to pay interest between the time of the original judgment and affirmance; though they are liable for interest after affirmance. 4 Bur. 2127. 2 T. R. 58.—18. In the court holden before the Lord Chancellor and treasurer and judges (under the 31 Edw. 3.), for examining erroneous judgments in the Exchequer, the practice is to give interest, from the day of signing judgment, to the day of affirming it there; computed according to the current, not according to the strictly legal rate of interest. 2 Bur. 1096.—19. In the house of Lords, they give sometimes very large, sometimes very small costs, in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below. Id. 1097.—20. And in order to mitigate costs, the plaintiff will sometimes withdraw his errors. Tidd, 1155. 1157.—21. The plaintiff in error, it seems, is not entitled to costs, where judgment is reversed for error in law. *Brown v. Chase*, 4 Mass. Rep. 436. *Nelson v. Andrews*, 2 Mass. Rep. 164.—22. Where judgment is reversed in part, and affirmed in part, no costs will be allowed to either party. Anon. 12 Johns. Rep. 340. }

[*]By the st. 8 & 9 W. 3. 11. in error on judgment for defendant if the judgment be affirmed, or the plaintiff discontinue, or be nonsuited, the defendant or tenant shall have costs. (q)

So by the same statute, if error be sued of a judgment on demurrer.

And by the stat. 4 & 5 Ann. 16. if a writ of error be quashed for variance or other defect: which was not before. 5 Mod. 67. Mod. Ca. 137.

By the st. 3 Jac. 8. & 13 Car. 2. 2. a writ of error shall be no *superseas*, unless a recognizance be given with sureties, &c. for payment of damages and costs.

And by the st. 13 Car. 2. 2. if error be brought of a judgment after a verdict, and the judgment be affirmed, the defendant in error shall have double costs. (r)

But the defendant in error shall not have costs, where by the writ of error the execution is not delayed; as, if error be sued by the plaintiff or demandant in the original action. 2 And. 123. R. Cro. Car. 401. R. 4 Mod. 7.—But now, by the st. 8 & 9 W. 3. 11. if the plaintiff or demandant, after any judgment for defendant, sue error, and afterwards discontinue, be nonsuited, or have judgment against him, the defendant or tenant shall have costs.

So, no costs, if execution be sued before error brought. R. 2 Cro. 636. R. 1 Vent. 88. 2 And. 123.

And if execution be executed in part, costs shall be diminished. Cro. Car. 175.

So, if neither damages nor costs were recovered in the original action; for then the writ of error does not delay execution;

As, in error upon a judgment in a *formedon*. R. cont. Cro. El. 617. R. acc. Cro. Car. 425.

In error upon a common recovery. R. Ray. 135. R. 1 Lev. 146.

So, if an executor brings error upon a judgment against his testator, and the judgment be affirmed, &c. the defendant shall not have costs. R. 1 Mod. 77, 1 Vent. 166.

Or, upon a judgment against himself, as executor. R. 3 Lev. 375. 4 Mod. 245. Skin. 400.

And therefore, an executor or administrator does not find bail for damages and costs upon a writ of error within the st. 3 Jac. 8. R. 2 Cro. 350, 2 Bul. 284. Cro. Car. 59. Lit. 3. 1 Sid. 183. Vide Bail, (K 3.)

So, if a plaintiff in replevin brings error, and judgment for the avowant be affirmed, he shall not have costs. R. 1 Sal. 205. Carth. 179. But this was 2 W. & M. before the st. 8 & 9 W. 3. 11.

[*]So, if judgment be reversed in error, the defendant does not pay costs.

(q) 1. This statute, however, only relates to judgments given on demurrer for defendants below, to whom remedy was intended to be given for their costs, both below and above, on affirmance of such judgments, which they had not before, 10 East, 5.—2. And no statute gives costs in error, upon the reversal of a judgment. 1 Str. 617., and see 5 East, 49.—3. Therefore when a judgment is reversed, each party must pay his own costs.—4. And accordingly, where the plaintiff in case recovered a verdict at the trial, and had judgment in the Common Pleas, and upon a bill of exceptions returned into the King's Bench, judgment was reversed, and the plaintiff took nothing by his writ, it was holden that the defendant could not have costs. 5 East, 49.—5. A judgment for the plaintiff was reversed on a writ of error in fact, brought by the defendant; and the court held that the plaintiff in error was entitled to the costs of the original action, though not to the costs in error. Per Cur. H. 40 Geo. 3 K. B. Tidd. 1158.

(r) Which statute is confined to cases where the judgment so affirmed is for the plaintiff below, 5 East, 545.

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in error; for if the plaintiff recovers his debt and costs which he ought to have had if he had recovered before. R. 2 Mod. Ca. 314.

[(B b) Costs in a feigned issue. (s)]

(C) DOUBLE, OR TREBLE COSTS.

(C 1.) By construction.

In all actions real, personal, or mixt, where damages are recoverable, if a subsequent statute gives double or treble damages, the costs also, as part of the damages, shall be double or treble. 2 Inst. 289. (t)

As, upon the st. of Gloc. 5. which gives treble damages in waste against tenant by the curtesy, or in dower. 2 Inst. 289.

Upon the st. 2 H. 4. 11. which gives double damages for a suit in the admiralty, where the cause of action arises upon the land. 10 Co. 116. 1 Rol. 517. l. 15. Dy. 159. b.

Upon the st. 8 H. 6. 9. which gives treble damages for a forcible entry. 10 Co. 115. b. R. 1 Vent. 22.

Upon the st. 5 El. 21. which gives treble damages for hunting in a park. 4 Leo. 36.

Upon the st. 2 W. & M. 5. which gives treble damages and costs of suit against him who makes rescous of goods which are distrained for rent. R. T. 6 W. 3. inter Sir W. Lawson and Story. 1 Sal. 205. Vide 1 Ld. Ray. 19.

(C 2.) By the express words of a statute.—Double costs.

So by (u) the st. 2 & 3 Ed. 6. 13. if a suggestion for a prohibition be

(s) 1. When a feigned issue is ordered by a court of law, whether it be in a civil or criminal proceeding, the costs always follow the verdict, and must be paid to the party obtaining it. 1 Lil. P. R. 344. Per Holt, Ch. J. Barnes, 130. 1 Wils. 261. 331. Say. Rep. 24. 1 Wils. 324. S. C., and see Burt. Prac. Excheq. 248, 9. Peake's Cas. Ni. Pri. 69. 204. 4 T. R. 402.—2. But when a feigned issue is ordered by a court of equity, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned back to the court which ordered the issue, and the costs there are in the discretion of the court. Ibid.—3. Where the issue is ordered by a court of law, on a rule for an information. Say. Rep. 229. 1 Burr. 603. Say. Costs, 144. S. C.—4. Or motion for an attachment. Say. Rep. 253.—5. The costs of the original rule or motion do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned from the time when the feigned issue was first ordered and agreed to. 1 Burr. 604.—6. Yet, where it was ordered by the consent-rule that the costs should abide the event of the issue, the court directed the whole costs to be paid under it. 2 Burr. 1021. Tidd, 974, 975.

(t) 1. Where the plaintiff recovers single damages, he is only entitled to single costs, unless more be expressly given him by statute.—2. But if double or treble damages are given by a statute, subsequent to the statute of Gloucester, in a case wherein single damages were before recoverable, the plaintiff is entitled to double or treble costs, although the statute be silent respecting them. Say. Costs, 228.—3. As in an action upon the 2 Hen. 4. c. 11. &c.

(u) 1. In some cases, double or treble costs are expressly given to the plaintiff; as upon the game laws, by the statute 2 Geo. 3. c. 19. s. 5.—2. And wherever a plaintiff is entitled to double or treble costs, the costs given by the court *de incremento*, are to be doubled or trebled, as well as those given by the jury. 2 Leon. 52. Cro. Eliz. 582. 3 Lev. 351. Carth. 297. 321. 1 Salk. 205. 1 Ld. Raym. 19. S. C. 2 Str. 1048. but see 1 T. R. 252.—3. But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs.—4. Where a statute gives double costs, they are calculated thus: the common costs; and then half the common costs.—5. If treble costs, 1. the common costs; 2. half of these; and then half of the latter. Table of costs.—6. Double or treble costs are also in some cases expressly given to the defendant; as in actions against justices of the peace, constables, &c. by the 7 Jac. 1. c. 5. Made per-

[*]not proved in six months (*x*), the defendant shall have a consultation (*y*), and double costs (*z*).

But this does not extend, where the defendant does not pray a consultation for not proving the suggestion, but joins issue upon it, and a verdict is for the plaintiff; for then the defendant shall not have double costs. R. Lat. 140.

Nor where a suggestion needs no proof.

So, by the st. 7. Jac. 5., in an action upon the case, or trespass in the courts at Westminster against a justice of peace, mayor, bailiff, headborough, portreeve, constable, tithingman, or collector of subsidy, for any thing done by virtue of their offices, the judge before whom it is tried may allow to the defendant double costs.

So, by the st. 21 Jac. 12., in an action against a churchwarden, overseer, swornmen, or any in their aid, or by their command, for any thing done in virtue of their offices.

And by these statutes the defendant shall have double costs upon certificate by the judge, though the plaintiff afterwards discontinue, or be nonsuited. Vide the statute itself.—So costs *de incremento* shall be double. Per Holt, Skin. 555.

And all the defendants shall have double costs. Vau. 117.

And this, though the declaration be insufficient. R. Cro. Car. 175. Vide ante, (A 5.)

Though it be not in trespass, &c. but in assumpsit, &c. for money which they took as officers. R. Sho. 215.

[*]But the defendant shall not have costs, if the judge does not certify that the defendant was an officer. Cro. Car. 175. R. 2 Vent. 45.

Or, if the officer acts in a matter ecclesiastical: as, if an action upon the case be against a churchwarden for a malicious presentment for incontinence, in the spiritual court. R. Cro. Car. 285. Jon. 305.

petual by the 21 Jac. 1. c. 12. s. 2. 2 Lev. 250. 3 East, 92.—7. For distresses for rents and services, by the 11 Geo. 2. c. 19. s. 21, 2.—8. On the building act, 14 Geo. 3. c. 78. s. 100. 9 East, 322.—9. Against officers of the excise or customs, by the 23 Geo. 3. c. 70. s. 34. 24 Geo. 3. sess. 2. c. 47. s. 35. 39. and 28 Geo. 3. c. 37. s. 23.—10. And against persons holding public employments, &c. and having power to commit to safe custody, by the 42 Geo. 3. c. 85. s. 6.—11. In these and similar cases, where it does not appear on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general issue,) and there is no particular mode appointed for recovery of the costs, the proper mode, after a nonsuit, or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll. 1 Str. 49, 50. Cas. Pr. C. P. 16. Cas. temp. Hardw. 126. Id. 138. 2 Str. 1021. S. C. Say. Rep. 214. 3 Wils. 442. 9 East, 322.—12. And it cannot be done by rule of court. 1 Str. 50.—13. Unless where the plaintiff moves for leave to discontinue, on payment of costs; in which case, the court may make it part of the rule that he shall pay double or treble costs. 2 Str. 974. Cas. temp. Hardw. 125.—14. But where a particular mode is appointed by statute, for the recovery of double or treble costs, as by the certificate of the judge who tried the cause, on the 7 Jac. 1. c. 5. there that particular mode must be observed. 2 Vent. 45. Doug. 307, 8. 7 T. R. 448. but see Doug. 308. n.—15. So that if the judge certify, there is no need of a suggestion; and if he do not, it is of no avail, except where judgment goes by default. Cas. temp. Hardw. 138, 9. Tidd, 976, 977.

(*x*) If the six months be understood to relate to the trial only, it must be understood with some latitude, as in the case of suits in the northern counties, or of prohibitions issuing in Trinity term. Ibid.

(*y*) It is doubtful whether the writ of consultation can now be granted on this statute. *Salter v. Greenway*, Tidd. 929.

(*z*) Which act has been construed to extend to prohibitions in suits for small tithes as well as great. 2 Ld. Rd. 1172.

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Nor in an action for neglect of his office ; as, for refusal of his vote in the election of a mayor. R. 2 Lev. 250.

For a malicious presentment. R. Cro. Car. 467. 12 Mod. 6.

(C 3.) Treble.

So, by the st. 8 El. 2. If any maliciously arrests in the name of another, without his consent, in B. R. or the marshalsea, and be convicted, &c. he shall be imprisoned for six months without bail, and shall pay treble costs to the person arrested.

By the st. 43 El. 2. for relief of the poor, in an action for any thing done by authority of that act, the defendant shall have treble damages and his costs, if the plaintiff be nonsuited, or has a verdict against him.

Though the money was not levied by distress, but voluntarily paid to the overseer, and he who paid it afterwards sues for the money. R. Yel. 176.

So by the st. 2 W. & M. 5. upon a rescous of a distress for rent, there shall be treble damages and costs.

So, by the statutes for the land-tax, if the defendant be sued as collector of the land-tax, he shall have treble costs.

Though by another count in the same declaration, he be charged for fraud in the execution of his office, which is not within the statute. R. Carth. 189.

And where treble damages and costs are given, the costs *de incremento*, as well as the damages, are treble. R. Skin. 555.

(C 4.) When not recovered.—Vide ante, (A 2, 3.)

But if a statute gives double or treble damages, where no damages were recoverable at all before, the plaintiff shall not have any costs. 2 Inst. 289.

As in waste against tenant for life or years (until the st. 8 & 9 W. 3. 11. gave costs if the single value found does not exceed twenty nobles). 2 Inst. 289. 2 Sand. 257.

In an action upon the st. 1 & 2 P. & M. 12. which gives 5*l.* and treble damages for driving a distress out of the county. R. Dy. 177. b. 1 Rol. 516. l. 45.

In debt upon the st. 2 & 3 Ed. 6. 13. which gives treble damages for not setting out of tithes (until the st. 8 & 9 W. 3. 11. gave costs where the single value found does not exceed twenty nobles). R. 2 Cro. 70. Cro. Car. 560. Mo. 915.

In an action for a forcible entry, upon the st. 8 H. 6. 9. Hard. 152.

Or, for ingrossing, upon the st. 5 & 6 Ed. 6. 14. Hard. 152.

In a *decies tantum*. Hard. 152.

Where the plaintiff or demandant recovers double or treble damages and costs, it is the safest way, that the damages and costs found by the jury be doubled or trebled ; and that there be no cost *de incremento*. 1 Rol. 517. l. 20.

[*]And the single damages found may be doubled, or trebled by the court. R. Yel. 176.

Yet costs *de incremento* may be given. 1 Rol. 517. l. 25.

And costs *de incremento* were trebled. Cro. El. 582.

If costs are given by a jury, when they ought not, there shall be judgment without respect to them. R. 2 Sand. 257.

[D. How recovered. (a)]

COSTS IN CHANCERY. Vide CHANCERY, (2 W.)

COTTAGES.

Vide JUSTICES OF PEACE, (B 84.)

(a) 1. Costs are taxed by the master in the king's bench, or prothonotaries in the common pleas, upon a bill made out by the attorney for the prevailing party.—2. Or more frequently without a bill, upon a view of the proceedings.—3. And if there have been any extra expences, which do not appear on the face of the proceedings, there should be an affidavit made of such expences, to warrant the allowance of them; which is called an affidavit of increased costs.—4. In country causes, such an affidavit is generally made; and if sworn before a commissioner, it must be filed with the clerk of the rules in the king's bench, or secondaries in the common pleas.—5. And in the former court, the clerk of the rules makes a copy of it for the master; but in the latter court, it is usual for the secondaries, on being paid for a copy, to mark the affidavit, and permit the original to be taken to the prothonotaries, who keep it till the costs are taxed, and then send it to the secondaries to be filed.—6. It is also usual to give notice to the opposite attorney, of the time when the costs are intended to be taxed; but in order to enforce it, there must be a side-bar rule to be present at taxing costs.—7. Which rule is obtained from the clerk of the rules in the king's bench, or secondaries in the common pleas, and a copy of it should be duly served.—8. After which, if the costs are taxed without notice, the taxation is irregular, and the attorney liable to an attachment.—9. The means of recovering costs, as between party and party, are by execution or action, upon a judgment obtained for them; or by attachment, upon a rule of court. 2 H. Blac. 218.—10. Thus in ejectment, where there is a verdict and judgment against the tenant, execution may be taken out, or an action brought thereon, for the costs. Run. Eject. 415.—11. But where the plaintiff is consulted for the defendant's not confessing lease, entry, and ouster, the lessor of the plaintiff must proceed by attachment, upon the consent rule. *Id. ibid* 1 Salk. 259. Barnes, 182.—12. And so where the nominal plaintiff is consulted upon the merits, or has a verdict and judgment against him, the only remedy is by attachment against the lessor of the plaintiff. Run. Eject. 415, 16. Tilly and Bailly, M. 6 Geo. 2.—13. In proceeding by attachment, a copy of the rule, with the officer's allocatur thereon, should be personally served on the party liable to the payment of costs. 3 T. R. 351. K. B. per Cur.—14. And at the same time the original rule should be shewn to him. *Id. ib.*—15. And a demand of payment made. H. 3d Geo. 3. K. B.—16. And where the costs are ordered to be paid to the attorney, the demand may be by the acting attorney in the cause, although he act in the name of another attorney. Say. Rep. 95.—17. If the costs be not paid, the courts, upon an affidavit of the circumstances, will grant an attachment.—18. The rule for which is absolute in the first instance, and may be moved for on the last day of term. Per Buller, Just. M. 24 Geo. 3 K. B. 1 Bos. & Pul. 477. Ante, 483, 4. 6 Bur. 2690.—19. To assist the parties in the recovery of costs, and do justice between them, they are allowed to deduct or set off the costs, or debt and costs, in one action, against those in another.—20. This practice, however agreeable to natural justice, does not seem to have obtained till lately in the court of king's bench. 2 Str. 691. 1803. Bul. Ni. Pri. 336. 4 T. R. 124. 8 T. R. 69.—21. But in the common pleas, it has been frequently allowed.—22. And that, not only where the parties have been the same, but also where they have been in some measure different; Barnes, 145. 2 Blac. Rep. 826. 889. 3 Wils 396. 36. S. C. Bul. Ni. Pri. 336. 2 H. Blac. 440. 587. 1 Bos. & Pul. 28. but see C. P. 311.—23. Thus a party has been permitted to set off a separate demand, due to himself alone, against a joint [*] demand, for costs payable by himself Barnes, 146. but see *id* 130.—24. And he has also been permitted to set off, for costs payable to himself and another, against a separate demand, for costs payable by himself only. Say. Costs, 254. 2 Blac. Rep. 827. S. C. 40. 3. K. B. 8. P. and see 1 H. Blac. 217. 657. 2 H. Blac. 597.—25. But where in an action of trespass against four defendants, the plaintiff obtained a verdict against one, and the other three were acquitted, the court would not suffer the costs of the three defendants who were acquitted, to be deducted out of the plaintiff's costs against that defendant who was found guilty; declaring the motion to be unprecedented. Barnes, 145. Bul. Ni. Pri. 336.; but see 1 H. Blac. 23. 217. 657. 2 H. Blac. 587.—26. And a judgment recovered by A. against B. and C. cannot be set off, on application to the general jurisdiction of the court, against another judgment recovered against A. by the assignees of B. under an insolvent debtors' act; the interest of third persons intervening, who have peculiar

claims by the statute. 3 East, 149.—27. In the king's bench, we have seen the court will not in general suffer the debt and costs in one action to be set off against those in another, until the attorney's bill be first discharged.—28. But in the common pleas, the attorney's lien for his costs, is holden to be subject to the equitable claims that exist between the parties in the cause. Id. *ibid.* and see Lee's Prac. Dic. 1 V. p. 108, 9. 340, 41.—29. Where the application is made by the party to whom the larger sum is due, the rule is for a stay of proceedings, on acknowledging satisfaction for the less sum. Bul. Ni. Pri. 336. 8 T. R. 60. 1 Taunt. 426.—30. But where the less sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings, on payment of the balance. 2 Blac. Rep. 869. 3 Wils. 396. S. C. Say. Costs, 254. and see 4 T. R. 124. Tidd, 977, 980.

COVENANT.

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(A) WHEN COVENANT LIES.

(A 1.) Upon what deed.

Covenant lies when a man covenants with another, by deed, to do something, and does it not. F. N. B. 145. A.

Or, that he has done it; when it is not done. Pl. Com. 308. a.

And it lies upon a covenant in any deed indented, or poll. 1 Rol. 517. l. 40.

So, for breaking a covenant by the lessee in the king's patent; though the lessee did not seal any counterpart; for his acceptance charges him. R. 1 Rol. 517. l. 50. 2 Cro. 522. R. 2 Cro. 240.

So, if a lease be to A. and B. by indenture, and A. seals a counterpart, and B. agrees to the lease, but does not seal, yet B. may be charged for a covenant broken. Co. L. 231. a. 2 Rol. 63.

Though the covenant be collateral, and not annexed to the land. Co. L. 231. a.

[A covenant to keep a house in good and sufficient repair, and so to leave it, binds the covenantor to rebuild, though the house be burnt down by accident. H. 12 Geo. 2. Com. 626. B. R. E. 13 Geo. 1. 2 Ld. Raym. 1477. Str. 763. S. C. B. R. T. 26 Geo. 3. 1 T. R. 310. B. R. E. 27 Geo. 3. 1 T. R. 710. B. R. E. 36 Geo. 3. 6 T. R. 650. Vide Pleader, (2 V 14.)]

So, if by charter-party made by B. he lets the ship to D., who covenants with B. and A. the part-owners, to pay 300*l.*, A. may have covenant, though he did not seal, but only B. and D. sealed it; for it is in the nature of a deed-poll by D., in which he may covenant with a stranger to the deed, though he cannot in an indenture. R. 2 Lev. 74.

So, if by articles A. covenants generally to indemnify B., he may have covenant, though he did not seal the articles, and the covenant was not with him. R. Lut. 305.

But covenant does not lie upon an agreement without deed; but an action upon the case. F. N. B. 145. A. G.

Yet by the custom of London, covenant lies without deed. F. N. B. 146. A.

So, by the custom of any other place. 1 Leo. 2.

But such custom shall be taken strictly; for upon such a covenant an executor shall not be charged. R. 1 Leo. 2.

So, covenant cannot be for a thing present. Pl. Com. 308. a.

[*](A 2.) Upon what words.

{ No particular technical words are required to make a covenant. Any words which import an agreement between the parties to a deed, will be sufficient for that purpose. Hallett v. Wylie, 3 Johns. Rep. 44. Harris v. Nicholas, 5 Munf. 483. }

A covenant is real or personal. F. N. B. 145. A. Co. L. 139. b. Vide Dett, (A 8, 9.)

A covenant real is, when a man covenants to levy a fine of lands or tenements, upon which a writ of covenant shall be brought, and a fine shall be levied. F. N. B. 145. A. 146. F.

A covenant personal is by express words, or by a covenant in law. Vau. 118. Co. L. 139. b.

Any words in a deed, which shew an agreement to do a thing, make a covenant : as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. *solvendo proinde* the interest to A. ; covenant lies against B. for the interest. R. 1 Rol. 518. l. 50. [Vide Doug. 27. 766.] Digest, Covenant 1.

If it be said in a lease that the lessee shall repair, and leave repaired, &c. R. 1 Rol. 518. l. 15. 2 Cro. 399.

That the lessee shall have wood, *non succidendo arbores* ; this is a covenant by the lessee that he will not cut down trees. R. Mar. 9.

If said, I have a deed and will produce it. 2 Mod. 89. R. 1 Rol. 519. l. 10.

So, if in a demise by the king's letters patent, it is said, that the grantee shall repair ; it shall be a covenant by him. R. 2 Cro. 522.

If there be a grant of an office, *absque impetitione, denegatione*, &c. covenant lies if the grantee does not enjoy. R. 1 Leo. 277.

So, if it be said, that it is agreed A. shall pay 10*l.* to B. for his goods ; this amounts to a covenant by B. to deliver his goods ; for, agreed, is the word of both. R. 1 Sand. 322. 1 Sid. 423. Ray. 183.

That A. shall take firebote, without cutting more than is necessary ; covenant lies against A. if he cuts more. R. 1 Leo. 324.

That an apprentice shall be faithful, shall not discover the secrets of his master, &c. R. Mo. 135.

[In a common indenture of apprenticeship under 5 El. c. 4. between the father, the son, and the master ; the father is answerable in covenant for what is to be performed by the son. Doug. 518.]

So, if tenant in tail leases for years, and afterwards covenants and grants that the lessee shall hold to him and his wife for the life of the lessor ; this does not amount to a surrender, or confirmation to enlarge his estate, but to a covenant. R. Dy. 272. b.

If the lessee agrees, that the lessor shall have two rooms of an house, and a lease be of the house, except the two rooms, and free passage to them ; if the lessor be disturbed in his passage by the lessee, covenant lies against him. R. 1 Sal. 196.

Otherwise, if disturbed in the rooms ; for they were excepted. 1 Sal. 196.

If a man covenants to stand seised to the use of his son, saving that his wife shall have the loppings of trees : if the son cuts down the trees, covenant lies against him. R. Cro. Car. 437.

If by articles of agreement it is said, that it is intended a fine shall be levied ; this amounts to a covenant to levy it. R. 2 Mod. 91.

If A. covenants, that B. shall take so many trees yearly, and afterwards [*]cuts them all down ; B. shall have covenant against him. Mod. 18.

So, if the words are introduced by words of condition ; as, if a lease be, upon condition that the lessee shall keep and leave the house in as good plight, &c. 40 Ed. 3. 5. b.

Or, with proviso, that if the lessee dies within forty years, his executor shall have it for so many years ; this is a covenant by the lessor, that the executor shall have it. 1 Rol. 518. l. 45.

So, provided and it is agreed, that the lessor shall find timber. 1 R ol. 518. l. 20.

Provided he pay out of the first profits of an office. R. 1 Lev. 155.

So, covenant lies if an agreement appears in an obligation. Ca. Ch. 294.

So, if it be said in a deed, that an obligation is in the hand of B. and that I will deliver it; covenant lies for not delivering it. R. 1 R ol. 519. l. 10.

So, if a man gives a release for money recovered by him, and at the end of the deed mentions, that he will not sue execution; if he afterwards sues it, covenant lies against him upon this deed. R. 1 R ol. 517. l. 45.

So, if a deed be, I oblige myself to pay at such a day; covenant lies. R. Hard. 178.

So, if by writing it is agreed, that A. shall give B. 70*l.* for a house; covenant lies against B. for not conveying the house. R. 1 Sand. 320. Ray. 183. 1 Sid. 423. 1 Lev. 274.

That A. shall be accountable to B. for all money received. R. 1 Lev. 47.

So, if A. assigns and transfers money due to him from a foreign state. R. 1 Mod. 113.

[If one covenant with another to do a certain act, in consideration of a reward, and the other prevent the stipulated thing from being literally performed, and accept of an equivalent, he may be sued for the reward; and the reason of the non-compliance with the literal terms may be averred. B. R. M. 20 Geo. 3. Dougl. 272.]

[So, where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part. B. R. T. 21 Geo. 3. Dougl. 684.]

When covenant or debt lies, vide Action, (M 4.)

{ Covenant will lie where the bargainor covenanted that he was "lawfully seised in fee," &c. without an eviction, where there is a defect of title. Pringle v. Witten's Ex'rs. 1 Bay, 254.

It will also lie for deficiency of the quantity of land. Ibid.

The rule of damages for covenant breach, is the value of the land at the time of eviction. Guerard's Ex'rs. v. Rivers, 1 Bay, 263. Liber v. Parsons' Ex'rs. 1 Bay, 18. }

(A 3.) Upon what not.

But where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate: as, a lease, provided and upon condition that the lessee collect and pay the rents of his other houses. R. 1 R ol. 518. l. 30.

So, if the words are only a qualification of the words on the other part; as, if a lessee covenants to repair, provided that the lessor finds timber: this is not a covenant by the lessor to find it, if there be not the word, agreed. R. 1 R ol. 518. l. 25.

If B. covenants to pay 100*l.* to A., and he covenants, upon receipt to [*]give an acquittance, and to make an obligation, &c. it is not any covenant that he will receive and give an acquittance. 2 Dan. 231.

So, if a deed be in the nature of a defeasance, covenant does not lie upon it, but an action upon the case: as, if by deed it be agreed, that a statute be cancelled, in the present tense. Semb. 1 Sid. 48.

[A clause in a marriage settlement, that "it is hereby agreed that the trustees should not be chargeable with, or accountable for any money arising in execution of the said trusts, but what the person so to be accountable

should actually receive," does not operate as a covenant by the trustees to be answerable for what they may receive: it is introduced, not to charge, but to discharge them; therefore, the liability they incur by a breach of trust, ranks as usual, only as a simple contract debt, and not a debt by specialty. 1 T. R. 42.]

So, if a mortgage be by A. to B. by a demise for years, with a proviso to be void if A. pay 10*l.* at such a day, and 410*l.* at such a day, and there be a bond for performance of all covenants, payments, &c. debt does not lie, if A. does not pay, without an express covenant for payment; for the mortgage is forfeited. Semb. 2 Mod. 36.

So, if the mortgage was by feoffment. R. 2 Cro. 281. Yel. 206.

[Where covenants are local, and the covenantee removes from the situation in which they were to be performed, no action can be maintained for their non-performance in another place. 2 Bos. & Pul. 565.]

{ And where the words of an agreement are merely descriptive of the subject matter, they will not be construed to amount to a covenant. As where the right of building and using a patent machine was granted, and the words "such as I have a patent right for" were introduced into the agreement, it was held, that these words did not amount to a covenant on the part of the vendor, that he had a valid patent right. Bull v. Pratt, 1 Conn. Rep. 342.

And covenant to assign as chattel, in as full a manner as A. B. had engaged to do, does not necessarily imply, that the assignment shall contain a covenant of warranty. Morrill v. Worthington, 14 Mass. Rep. 389. }

(A 4.) When it lies upon a covenant in law.

So, some words import and make a covenant in law, though there be not any express covenant: as, if a man, by deed demise land for years, and the lessee is ousted; covenant lies upon the word *demisi*. 1 Rol. 519. F. R. 4 Co. 80. b. Dy. 257. a. R. 2 Leo. 104. Cro. El. 674. R. 2 Cro. 73. Vide Garranty (A).

So, if he demise, or assign, by the word, *concessi*.

So, if he demise *reddendo* rent; covenant lies for nonpayment of the rent, upon the word *reddendo*. 1 Rol. 419. l. 25. 1 Sid. 266. 447.

Though the reservation be to a stranger. Per Hale, 1 Mod. 113.

So, if he convey the inheritance with warranty, and the feoffee, &c. be evicted for years; covenant lies upon the word *warrantizo*. R. 1 Rol. 519. l. 20. Yel. 139. 1 Rol. 25. R. Hob. 3.

So, it lies upon a warranty in a fine *sur concessit* for years. 2 Sand. 180. 1 Lev. 301. 1 Sid. 466.

So, it lies against a woman after the death of her husband, upon a warranty in a fine by them *sur concessit* for years. R. 1 Sand. 180. 1 Mod. 291.

So, it lies upon a warranty in law, by the word *dedi*, &c. if he be evicted for years.

Or, by the word *dedi*, *concessi*, or *demisi*, of an estate for life, though the eviction be only for years; for he cannot be aided by voucher, rebutter, or *warrantia chartæ*. R. Hob. 4.

[An implied covenant is included in the words "bargain and sell," the same as in the word "grant." 15 East, 530.] { Vide Frost v. Raymond, 2 Caines' Rep. 188., contra. But the word *dedi* implies a warranty of title. Ibid. S. P. Keut v. Welch, 7 Johns. Rep. 258.

The words *concessi* or *feoffari* import a warranty, in an estate for years; but not in an estate in fee. Frost v. Raymond, *ubi supra*.

The word *dedi* implies a warranty only for the life of the grantor; and if

the deed contain an express warranty, it will qualify and restrain the implied warranty. *Kent v. Welch, ubi supra.* }

So, covenant lies upon the word *demisi*, if the lessor had not power to demise ; though the lessee never entered, nor was evicted. *R. Hob. 12.*

[*] Though the lease was good only by estoppel. *R. 2 Cro. 73.*

So, if he demises, *reddendo* such a rent free of all taxes ; covenant lies, if he does not pay it, discharged of taxes before or afterwards imposed. *R. Carth. 135.*

So, if a lessee for years be distrained by the lord paramount ; he shall have covenant against him in the mesnalty, though he cannot have a writ of mesne. *Ray. 257.*

So, if a lessor does an act which destroys or defeats the effect of his grant, covenant lies against him ; as, if A. grants the use of a way to B. and afterwards stops it. *1 Sand. 322.*

But an express covenant controuls the generality of a covenant in law ; and therefore if a lessor covenants, that the lessee shall enjoy without eviction by him or any who claim under him, covenant does not lie upon eviction by a stranger. *R. 4 Co. 80. b.*

[Where, by the custom of the country, a distress may be taken for half a year's rent on a lease in advance, the custom is valid, and forms a part of the contract. *2 T. R. 600.*]

[A tenant under a lease which excludes terms that the custom of the country would otherwise supply, holding over, holds on the same terms as before. *16 East, 71.*]

So, if a lessor covenants, that the lessee shall take estovers by assignment, he cannot take them without assignment. *Semb. Dy. 19. b.*

[Under a covenant by the lessee to plough the premises in a due course of husbandry, except the rabbit-warren and sheep-walk, an implied covenant not to plough those portions arises. *16 East, 352.*]

If a lessee covenants to repair at his own charges, he cannot take timber. *Vide Dy. 198. b. 314. a.*

[If houses leased are burned down, the landlord, unless under a covenant, is not bound to rebuild, though he has insured. *1 T. R. 312.*]

So, if goods be demised by indenture for years ; if the lessee be evicted, covenant does not lie upon the word *demisi* ; for the law does not create a covenant for a personal thing.

So, if A. demises a house, and the use of a pump ; covenant does not lie, if the lessee cannot use it. *R. cont. per three J. but Twisd. acc. and the judgment was reversed. 1 Sand. 322. 1 Sid. 430.*

So, if A. covenants or promises by deed, to do such a thing ; covenant does not lie by any one not named in the deed. *R. 1 Sal. 197. [Vide B. R. E. 6 Will. 3. Salk. 214. 1 Ld. Raym. 28. S. C.]*

[But, on a promise in writing without seal, made to one person for the benefit of another, an action of assumpsit may be maintained by the person for whose benefit the promise was made. *B. R. M. 29 Car. 2. 1 Vent. 318. 322. B. R. E. 16 Geo. 3. Cowp. 437.*]-

(B) BY WHOM IT LIES.

(B 1.) By an executor, or administrator.

If a man covenants with B. to do a personal thing, and B. dies ; his executor or administrator shall have covenant upon it. *F. N. B. 145. D. 146.*

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D. Reg. 165. b.—By whom, and to whom, a condition shall be performed, vide Condition, (G 1, 2.—O 1, 2.) By whom debt lies, vide Dett (C—D.)

[*]So, if he covenants with B. and does not name his executor or administrator.

So, if he covenants with B. his heirs and assigns, upon a grant or conveyance of an inheritance, the executor or administrator of B. may have covenant for damages, upon a breach in his lifetime. R. 1 Vent. 176. 347. 2 Lev. 26.

So, if he covenants with a bishop and his successors to repair a rectory demised; the executor of the bishop may have covenant for a breach in his lifetime. R. 2 Vent. 56.

(B 2.) By an heir.

So, where the covenant relates to the inheritance, the heir may have an action upon it. 1 Rol. 520. l. 42.

[Grant in fee to a man and his heirs, with a covenant from the grantor to the grantee and his heirs for further assurance. Request by the grantee, and refusal by the grantor, held, that the heir of the grantee, after the death of his ancestor, might sue on the covenant for such refusal, and consequent eviction of himself by title paramount. 4 M. & S. 188. 1 Mars. 107. 5 Taunt. 418.]

As, if an abbot covenants with a lord of a manor to sing in his chapel, for him and his family. 42 Ed. 3. 3. Dy. 24. a.

If one parcener, upon partition, covenants with the other, to acquit her of a suit issuing out of the land. R. 42 Ed. 3. 3. b. Vide Co. L. 385. a. 5 Co. 18. a.

If a man covenants with another and his heirs, to make such an assurance, Bend. pl. 260. Dy. 338. a. 1 And. 55.

If a man covenants to convey part of lands purchased, to the heir of his coparcener. R. Dy. 338. a.

To leave the estate in repair at the end of the term. R. 2 Lev. 92.

Though the covenant be with the lessor, his executors and administrators, and does not name the heir. R. 2 Lev. 92. Where the covenant was such as runs with the land, and appears to be intended to have continuance after his death.

(B 3.) By an assignee.

So, by the common law, upon a covenant in law, the assignee of the estate shall have an action. Dy. 257. F. N. B. 146. C. 1 Rol. 521. l. R. 4 Co. 80. b. R. 5 Co. 17. a. Mo. 419.

So, tenant by statute-merchant, &c. who comes to the land by act of law. 5 Co. 17. a.

So, though the assignment be by parol, where it may be good by parol. Mo. 419. Cro. El. 437.

So, upon a covenant which runs with the estate, the assignee shall have an action, though not named; as, if an abbot covenants to sing for B. and all the lords of such a manor, in his chapel there; the assignee of the manor shall have covenant. 1 Rol. 521. l. 15. 5 Co. 17. b. Co. L. 385. a. { Vide Bickford v. Page, 2 Mass. Rep. 460. Niles v. Sawtell, 7 Mass. Rep. 444. Stinson v. Sumner, 9 Mass. Rep. 143. Estabrook v. Hapgood, 10 Mass. Rep. 313. M'Crady v. Brisbane, 1 Nott & M'Cord, 104.

And the assignee of the lessor shall have covenant against the lessee, for rent in arrear. Harrison v. Steele, 4 Har. & M'Hen. 218. }

If one parcener covenants with the other to acquit her of a suit due on the land, the assignee of the other parcener shall have covenant. 1 Rol. 521. l. 22. 5 Co. 18. a. Co. L. 384. b. 385. a.

If a lessee covenants to repair; the assignee of the reversion [*] shall have covenant. R. 1 Lev. 109. R. 3 Lev. 326. Adm. 1 Sal. 317.

So, if he be named, the assignee shall have covenant by the common law, upon a covenant which relates to the inheritance: as, if a man covenants with a purchaser, his heirs and assigns, to make further assurance, &c. R. 1 Rol. 521. l. 25. R. Cro. Car. 503.

If he covenants with a lessee, his executors and assigns, that he shall retain out of his rent. Semb. Cro. Car. 137.

And now, by the st. 32 H. 8. 34. patentees of the king, and grantees or assignees of reversion from the king, or any other, may maintain actions for not performing the covenants, &c. expressed in their leases, against the lessees, their executors, administrators, or assigns, as the grantors might have done. Vide Condition, (O 2.)

[It is extremely well settled at common law, without referring to this statute, that covenants which run with the land will pass to the person to whom the land descends. Per Lord Kenyon, C. J. B. R. T. 29 Geo. 3. 3 T. R. 401.]

And thereupon the patentee of the king (as the king himself) shall have covenant against the lessee, his executor or assignee. R. 2 Rol. 64.

Though he be assignee of the reversion only for years. R. Cro. El. 600. 617.

{ But where there have been sundry conveyances with covenants of warranty, and the last covenantee is evicted, an intermediate covenantee, who has not been damnified, cannot have covenant against a prior covenantor. Booth v. Starr, 1 Conn. Rep. 244. }

So, covenant lies by an assignee, against the lessor or his executor for rent due after the assignment of the term, and acceptance of rent from the assignee. R. 3 Lev. 233. R. 2 Rol. 64. Vide post, (C 1.)

So, it lies by an assignee of part of the estate demised. Semb. 1 Leo. 250.

Or, the assignees of several parts may join. R. 1 Lev. 109. 1 Sid. 157. Ray. 80.

And though the lessee did not covenant with the lessor and his heirs and assigns, but only with the lessor, his executors and assigns; yet the assignee of the reversion, being entitled to the rent, shall have covenant for it, as incident. Per Hale, 2 Sand. 371.

Or, covenanted with the lessor and his heirs, without naming assigns. R. Mo. 27. 159. 242. 1 Lev. 109. 1 Sid. 157.

So, if a woman lessee takes husband, the husband shall have covenant upon a covenant in law. R. 5 Co. 17. a.

Or, upon any express covenant by the lessor. 5 Co. 17. a.

So, tenant by statute, *elegit*, &c. though he comes to the land by act of law. Ibid.

And where an assignee shall have covenant, it extends to an assignee in fact or in law.

And to an assignee of an assignee, *toties quoties*. 5 Co. 17. b.

And to the executor or administrator of an assignee; or the assignee of an executor or administrator. Ibid.

And covenant lies by an assignee, upon every covenant, which concerns the land; as, to pay rent, not to do waste, &c. Vide Condition, (O 1, 2.)

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So, upon a covenant to leave the lands in good repair at the end of the term. R. Cro. El. 600.

To make a wall upon the land. R. Mo. 159.

To enter to view the repairs. 1 Leo. 62.

[*] To make a new lease at the expiration of the first. Mo. 159.

[To make a covenant run with an estate, it is not sufficient that it should concern the estate, but there must be a privity with respect to the estate between the covenantor and covenantee. R. 3 T. R. 393.]

[Therefore where the lessee of a mortgagor and mortgagee under a lease made after the forfeiture of the mortgage covenanted with the mortgagor and his assigns, to pay the rent to him or them, the covenant was held to be a collateral one, and it was determined that an assignee of the mortgagor and mortgagee could maintain no action upon it. Ibid. P. G.]

[An assignee cannot maintain an action for any breach of covenant which takes place after the reversion which the original covenantee had is extinct or destroyed. R. 3 T. R. 393.]

[Therefore where a termor for 99 years granted a lease for 11, and assigned the reversion, after which the assignee purchased the reversion in fee; it was held that as the covenants upon the lease for 11 years, were incident to the reversion of the termor for 99, and that reversion was merged in the reversion in fee, no action could afterwards be brought by the assignee for a subsequent breach of any of those covenants. R. 3 T. R. 393. P. C.]

But the st. 32 H. 8. 34. does not extend to collateral covenants, which do not concern the land demised: and therefore the assignee shall not have covenant for a collateral covenant broken. 5 Co. 11. a. vide Condition, (O 1, 2).

Nor, if a covenant be contingent, or upon a possibility: as, that if the lessor upon his view finds the lands, &c. well repaired at the end of the term, he will make a new lease. R. per three J. Mo. 27.

So, an assignee of an apprentice by the custom of London, shall not have covenant upon the original indenture. R. Sho. 4.

So, an assignee of a lease, which appears to be good only by estoppel, shall not have covenant. R. Cro. El. 437. Mo. 419.

So, covenant does not lie by an assignee, for a breach done before his time.

{ So where the grantor is not seised, the covenant is immediately broken; and no action can be sustained by the assignee of the grantee, against the grantor, for after the covenant is broken, it is a mere *chose in action*, which cannot be assigned. Greenby v. Wilcocks, 2 Johns. Rep. 1.

But it is otherwise, if the breach happens after the assignment. Kane v. Sanger, 14 Johns. Rep. 89. }

Yet where a breach is continuing, it shall be otherwise: as, if a covenant be to repair within such a time after notice; if the lessee does not repair upon notice by the assignee, covenant lies, though it was out of repair before the assignment. R. Mo. 242.

So, covenant lies by an infant against a man of full age; though there are mutual covenants, and the covenant by the infant does not bind. R. 1 Sid. 446. Vide Action upon the Case, (B 14.)

But covenant does not lie by the covenantee, after his assignment of the reversion. D. 3 Lev. 154. Vide Dett, (D).

[The title of a grantee of a reversion is complete without attornment; so that he will be entitled to all arrears of rent accrued since the execution of

the conveyance, and not paid to the grantor by the tenant in default of notice. 1 T. R. 378.]

[That the assignee of the reversion may sue on the covenants annexed, he must, when his supposed cause of action accrues, have the same estate as was left in the lord, on creating the tenure; to that alone were the covenants annexed; and therefore, having which alone, can he claim them. Hence, if the reversion be for years, and the assignee takes a [*]conveyance of the fee, the estate to which the covenants were annexed being merged, they are merged with it. 3 T. R. 393.]

[It seems that an assignee of the reversion could not, at common law, sue on the covenants annexed. And that he was first enabled so to do, by the statute 32 Hen. 8. c. 34.; else that act had been unnecessary. 3 M. & S. 382.]

[The assignee of a void lease cannot sue on the covenants contained therein. 1 N. R. 158.]

(C) AGAINST WHOM IT LIES.

(C 1.) Against an executor, or administrator.

So, if a man covenants with B. and dies, an action lies against his executor or administrator upon it, though he be not named in the covenant. 1 Rol. 519. l. 35. 40. Dy. 14. a. Dub. Dy. 114. a. Cro. El. 553.

So, in all cases, an executor is bound by a covenant, if it does not determine by the death of the covenantor. 1 Rol. 519. l. 33. 2 Mod. 269.

So, if he covenants for him and his assigns: for an executor or administrator is an assignee. R. Mod. 44.

[So, covenant lies against an administrator of a term or for a breach of covenant in not repairing in his own time, and judgment shall be *de bonis propriis*. Ld. Raym. 554.]

But it does not lie upon a covenant in law not broken until the death of the covenantor. R. Dy. 257. a.

Nor, if a covenant be for a personal act of the testator, if the breach be not in his lifetime.

[Therefore, if A. covenant, in consideration of a weekly payment to him and his executors during his own and his wife's life, he will not exercise a particular trade, the executors are not bound to abstain from exercising that trade. 2 Bl. Rep. 856.]

So, if a man covenants for him, his executors and assigns; covenant lies against him, or his executor, for a breach done after assignment of his term to another, and acceptance of rent from the assignee. R. 2 Cro. 309. R. 2 Cro. 522. 1 Rol. 522. l. 15. 30. R. Cro. Car. 133. 530. Vide ante, (B 3.)

And this, upon all covenants in fact, though it might be brought against the assignee; for the covenantee has an election, in covenants which bind the assignee, to charge him or the covenantor himself, though he has accepted rent from the assignee. R. Jon. 223.

But upon a covenant in law, after assignment of the term, and acceptance of rent from the assignee, covenant does not lie against the assignor. Jon. 223. 1 Sid. 447.

[Against the executor of a joint-lessee, if the covenant is joint and several, even though he died before the term commenced, and the whole term, interest, and benefit survive to the other lessee. T. 1 G. 3. 2 B. M. 1190.]

[If a fine be levied of a feme covert's estate, with a joint power to husband [*270]

and wife to declare the uses ; and the uses be declared by the husband and wife, in remainder to A. If the husband make a lease and covenant for quiet possession against any person claiming under him, and [*]A. evict the tenant after the husband's death, his executor shall be liable in an action of covenant by the tenant. Doug. 43.]

{ It seems, that an executor who, as such, has given a deed of land, containing covenants of warranty and seisin, is personally liable for a breach of covenant. Caswell v. Wendell, 4 Mass. Rep. 108. Sumner v. Williams, 8 Mass. Rep. 162.

An executor is bound by the covenant of his testator, warranting the title of a slave, though not named. Lee v. Cooke, 1 Wash. 306.

So also, in covenants respecting real property. Harrison v. Sampson, 2 Wash. 155. M'Crady's Ex'rs. v. Brisbane, 1 Nott & M'Cord, 104. }

(C 2.) Against an heir.

So, if he covenants for him and his heirs, covenant lies against the heir. Lut. 287.

So, if tenant in fee leases for years, and covenants for enjoyment, and the lessee is ousted by his heir ; covenant lies against the heir, in respect of the privity, though he be not named. Semb. Dy. 257. b.

So, if a lease be by the word *demisi*. 2 Leo. 104.

[In covenant, which runs with the land, evidence that the defendant is in as heir, will support a declaration charging him as assignee. B. R. M. 31 Geo. 3. 4 T. R. 75.]

{ The liability of an heir upon covenants made by his ancestor is contingent ; depending upon the inability of the creditor to obtain satisfaction from the ancestor's estate, in a course of administration ; nor is the heir liable during the time limited for granting letters of administration. Royce v. Burrell, 12 Mass. Rep. 595.

Lands descending to an heir, in a foreign jurisdiction, are not assets by which the heir may be charged with the covenant of his ancestor. Austin v. Gage, 9 Mass. Rep. 395. }

(C 3.) Or an assignee.

So, if a man covenants to do a thing, which has existence at the time of the demise, and relates to it ; the covenant runs with the land, and binds the assignee, though he be not named ; as, if he covenants to pay the rent reserved.

[That a covenant may be appurtenant to and run with land, it is not sufficient that it be concerning the land ; there must likewise subsist a privity of estate between the contracting parties. 3 T. R. 393.]

[Those covenants alone which tend directly, not merely through the intervention of collateral causes, to improve the estate, run with the land. 10 East, 130.]

[A covenant by a lessee of tithes for himself and his assigns, not to let any of the farmers in the parish have any part of the tithes, runs with land. 3 Wils. 25.]

[A covenant to reside constantly upon the demised premises, runs with the land. 2 H. B. 133.]

[Lessee of tithes covenanted, for himself and his assigns, not to take tithes in kind from the other party (the owner of lands in the parish), nor from his tenants, but to accept a reasonable composition, not exceeding 3s. 6d. [*271]

per acre. (His under-lessee is not an assign within the meaning of the covenant.) 2 Anst. 413. The tithes are not bound by such a covenant of the lessee. Ibid. The tenant of the lands cannot take advantage of such a covenant entered into with his landlord, to which he himself is no party. Ibid.]

[Two are parties on the same side to a deed of demise ; for example, mortgagor and mortgagee, of whom the one (the mortgagee) has a right to lease, the other (the mortgagor) not ; the latter either does not join with the former in demising, or joining, admits his own want of title ; and the covenants by the lessee are with the latter only. Now, though the covenants are available by the mortgagor, not being founded upon the condition that he has granted a lease, still they are mere independent contracts, and have no connection with the tenure, to which, as it only subsists between the party demising and the covenantor, the mortgagor is a stranger ; therefore, on assigning the reversion, they do not pass to the assignee, but remain available by the mortgagor. 3 T. R. 393. Id. 678. 1 H. B. 562.]

[Covenant lies not against the assignee of a term, for a breach before the assignment. 2 Burr. 1271. 1 Blk. 351.]

[*][Covenant on a covenant running with the land, to pay rent for instance, lies against an assignee of part of the land demised. 2 East, 575.]

[The assignee of a term may discharge himself by a *bona fide* assignment to any one. 1 B. & P. 21.]

[The assignee of a term, declared against as such, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and agreed thereby that the term which was determinable at his option, should be absolute. Dougl. 764.]

[The tenant's assignee is estopped, as was the tenant himself. 2 Taunt. 278.]

To repair the house demised. R. 5 Co. 16. b. 17. b. R. 5 Co. 24. a. b. Dy. 13. b. in marg. R. Cro. El. 457. 552. R. 1 Rol. 521. l. 37.

To discharge the lessor of all charges ordinary and extraordinary. 5 Co. 24. b.

To permit the lessor to have free passage to two rooms excepted by the demise. R. 1 Sal. 196.

To leave so many acres yearly *sine cultura*. R. 2 Cro. 125.

So, if a man covenants to do a thing which relates to a demise, and covenants for him and his assigns expressly ; this binds his assignee, though the thing had not existence at the time ; as, if a lessee covenants for him and his assigns to build a new wall upon the land. R. 5 Co. 16. b.

[Covenant from lessee of tithes for himself or assigns not to let the farmers have their tithes, runs with the tithes and binds the assignee. M. 10 G. 3. 3 Wils. 25.]

So, covenant lies against an assignee of part of an estate in lease, for a breach on his part. R. 1 Rol. 522. l. 5. Cro. Car. 222. Jon. 245.

So, if a man covenants for him and his assigns, so long as they shall be in possession ; covenant lies against the assignee, if he continues in possession after the term expired, though he be not strictly an assignee. Semb. Sti. 407.

So, if an assignee of a term covenants for him and his executors, the executor may be charged as assignee. 1 Sal. 317.

But if a man covenants for him and his assigns to do a collateral thing, which does not concern the land, the assignee shall not be charged for it :

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as, if a lessee covenants to build a house upon other land of the lessor. R. 5 Co. 16. b. Jon. 223. Vide Condition, (O 1, 2.)

If a lessee covenants for him and his assigns to pay money to a stranger. 5 Co. 16. b.

Or, a collateral sum to the lessor himself. Ibid.

So, if goods are demised, and the lessee covenants for him and his assigns, to leave them in as good plight, or to pay so much for them; covenant does not lie against the assignee of the goods; for there wants the privity between him and the lessor, which there is when land is demised. R. 5 Co. 16. b.

So, if land be demised with stock, &c. and the lessee covenants for him and his assigns, to deliver the stock at the end of the term; covenant does not lie against the assignee, for the covenant is merely personal, though the rent was increased in respect of the stock. 5 Co. 17. a.

So, if a grantor of a rent-charge covenants to pay it free from taxes; [*]covenant does not lie by the heir of the grantee, against the assignee or lessee of the land. R. 1 Sal. 198.

So, if a bishop covenants for him and his successors, the successor shall not be bound but only to the covenant usual in former leases. R. 2 Lev. 68. 1 Vent. 223.

So, if a lessee covenants for him and his assigns to pay rent, and he assigns to B., and the lessor accepts the rent of B., who afterwards assigns to C., covenant does not lie against B. for rent incurred after the assignment to C. though the lessor had no notice of the assignment. R. cont. per. two J. in C. B., but the judgment was reversed in B. R. inter Pitcher and Tovy. 4 Mod. 71. 3 Lev. 295. Carth. 177. [unless it be averred that the assignment was fraudulent. Doug. 462. n.] Vide Dett, (E).

[And although it be stated in the declaration that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute. B. R. T. 21 Geo. 3. Doug. 764.]

[An assignee is liable only from the privity of contract, and must be charged according to the truth of the case, and therefore, when in covenant, the plaintiff declared against the defendant as assignee of all the estate, &c. in the premises, and it appeared in evidence that he was assignee of part only, the court held it to be a fatal variance, and the plaintiff was nonsuited. B. R. E. 18 Geo. 3. Cowp. 766.]

[But the grantee of a reversion may bring debt against the original lessee for the whole rent, although such lessee hath assigned over part of the premises, because the privity of contract for the whole remains against the lessee. Cro. Eliz. 633.]

[But it lies against the assignee under an absolute indefeasible assignment of the whole interest in the term even before he take possession. Doug. 461 to 463. n.]

[But not against a mortgagee of the term, even after the mortgage is forfeited, till he take actual possession. Doug. 455.]

So, if a covenant be to build a house before Michaelmas, and after Michaelmas he assigns to B., covenant does not lie against B. for it was broken before the assignment. R. 1 Sal. 199.

[So, if lessee covenants to pull down old houses, and build new on the ground within seven years, and does not, but after seven years assigns; assignee is not liable. H. 2 G. 3. 3 B. M. 1271. 1 Bl. Rep. 351.]

[If the whole of a term is made over by the lessee, though in the deed he reserve the rent, and a power of entry for non-payment, to himself, instead

of the original lessor, the person to whom it is made over may sue the original lessor, or his assignee of the reversion, or be sued by them as assignee of the term, on the respective covenants in the original lease. Doug. 187, 187. n.]

[But an under-tenant, who has not the whole term, cannot be sued as assignee. Doug. 183 to 187.]

[A grant by lessees for lives of all their estate, right, title, interest in the premises to one and his executors, *habendum* to him and his executors for 99 years, if the lives should so long live, in as large, ample, and beneficial way as the grantors, their heirs, held, is no assignment of the freehold, and consequently not of the whole interest of the grantors in the [*]lease; and the reversioners (the lives being expired within the term) cannot maintain covenant against the under-lessees. 1 East, 502.]

[Covenant lies against the assignee of a lessee for part of the rent, as in such case the action is brought on a real contract in respect to the land, and not on a personal contract. 2 East, 575.]

[And in case of eviction the rent may be apportioned as in debt or replevin. Ibid.]

[*Aliter* in covenant against the lessee himself, who is liable on his personal contract. Ibid.]

[If lessee for years covenant that he, his executors or administrators, shall not assign without consent in writing, and become bankrupt; the covenant does not bind the assignees under the commission, in case they make a fair assignment. Ambler, 480.]

[A covenant in a lease not to assign or underlet without leave of the landlord in writing is a fair and usual covenant. B. R. E. 33 Geo. 3. Esp. Cas. 8.]

For pleading in a writ of covenant, vide Pleader, (2 V. 1, &c.)

(D) COVENANT, HOW EXPOUNDED.

(D 1.) In regard to the context.

A covenant shall be expounded with regard to the context and intent of the deed; and therefore, if A. conveys a third part of his estate to B. for the life of another, and covenants to do any act, &c. for the better assurance of his estate to B., such covenant extends only to the better assurance of the said third part to B. for the life of the other. R. Hob. 275. Vide Parols, (A 18.)

{ A recognition of the same principle may be seen in Quackenboss v. Lansing, 6 Johns. Rep. 49. Vide Ernst v. Bartle, 1 Johns. Cas. 319. Jones v. Gardner, 10 Johns. Rep. 266.

A covenant to convey the title, shall be intended to mean the legal estate in fee, free from all claims, &c. Jones v. Gardner, *ubi supra*.

A covenant to execute and deliver a good and sufficient deed, means such a deed as will convey the title: Therefore, the conveyance of a doubtful title is not a performance of the covenant. Clute v. Robison, 2 Johns. Rep. 595.

Rules of construction in miscellaneous cases. Folliard v. Wallace, 2 Johns. Rep. 395. Gardner v. Gardner, 10 Johns. Rep. 47. Corporation of New-York v. Cushman, 10 Johns. Rep. 96. Cramer v. Bradshaw, 10 Johns. Rep. 484. Ten Eyck v. Tibbits, 1 Caines' Rep. 427. }

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If a covenant be, that a jointure is and shall continue of such a value notwithstanding any act by him, the words, notwithstanding any act, extend to the value at the time of the jointure, as well as to the continuance. R. Cro. El. 43.

If, upon the marriage of his daughter, a man covenants to pay to husband and wife 20*l.* per ann. it shall be understood for their lives. R. 1 Sid. 151.

If a deed recites legacies of 50*l.* given to A. C. and D., and thereupon it is covenanted to pay to A. B. C. and D. the legacies and sums aforesaid; he is not bound to pay 50*l.* to B. to whom no legacy was given. R. 2 Vent. 140.

If a mortgage is made, upon condition to be void upon payment at such a day, and there be a covenant or obligation to perform all covenants and conditions in the deed of mortgage, an action lies if he do not pay at the day in the condition. R. 2 Lev. 116.

[If A. demise to B. for lives, with covenant to renew, on the death of every life, under the same rent and covenants, this shall be taken as a perpetual covenant of renewal. Cowp. 819.]

[If A. demises land to B. who by deed-poll covenants, that if A. should give him possession of a piece of ground adjoining, or if he should by any ways have possession thereof, he should pay the demised premises and the said ground an additional rent; if B. gets possession of said adjoining ground he shall pay the additional rent though it was by lease from a third person. M. 10 G. 2. B. R. H. 319.]

[*][In a building and repairing lease, a covenant to leave the demised premises with all new erections, well repaired, extends to new erections only, if a sum is agreed to be laid out in new erections and rebuilding, and the covenant to keep in repair extends to new erections only. P. 30 G. 2. 1 B. M. 287.]

[Under a covenant in a building lease by the tenant to pay all the taxes (except the land-tax), the landlord is to pay only the old land-tax, and not the additional land-tax occasioned by the improvement of the estate. B. R. T. 29 Geo. 3. 3 T. R. 377.]

[The tenant of a house covenanted in his lease to pay a reasonable share and proportion of supporting, repairing, and amending all party-walls, &c. and to pay all taxes, duties, assessments, and impositions parliamentary and parochial, it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money, without any deduction whatever. During the lease, the proprietor of the adjoining house built a party-wall between that house and the house demised under the stat. 14 Geo. 2. c. 78., and it was holden that the tenant (not the landlord) was bound to pay the moiety of the expence of the party-wall. 8 T. R. 602.]

[In covenant on a charter-party, by which it was agreed to employ a ship of which the plaintiff was the captor, as soon as condemnation should have passed, the sentence must be taken to mean a legal sentence; and the party who sues for the freight must aver that the ship was condemned by a court having competent jurisdiction. 1 Term Rep. 674.]

[In covenant on a charter-party, in which the defendants covenanted to pay so much for freight for "goods delivered at A." freight cannot be recovered *pro rata itineris*, if the ship be wrecked at B. before her arrival at A. though the defendant accept his goods at B. B. R. M. 38 Geo. 3. 7 T. R. 381.]

[Perhaps an action of assumpsit or a *quantum meruit* might have been maintained. Sembl. *ibid.*]

[A. purchases at a sale by auction, a lot described in the particulars of sale as eleven houses, No. 1, 2, 3, &c. situated, &c.; and it is stated that "the estate is held by lease of B." Previous to the lease, a small part of the ground of No. 2, is subtracted from the possession of the lessee: but the lease, nevertheless, contains a description and plan in the margin of the whole ground plot, including that part. Held, that although in equity B. should not be entitled to enforce the covenants in the lease, as to that part of the ground, yet that the particulars of sale being, with reference to the lease, without an exception of the plot subtracted from the possession, A., the purchaser, is entitled to call upon the vendor to complete his purchase, by making a good title to the whole estate contained in the lease, is not a compliance with the conditions of sale, the vendor not being able to convey the above-mentioned small plot of ground. 3 Smith, 435.]

(D 2.) To synonymous, and other words.

So, distinct covenants shall be expounded with regard to covenants synonymous, or of the same nature, in the same deed; as if a man [*]covenants that notwithstanding any act by him, he is seized in fee; that he has power to sell; the last shall be expounded, that he has done nothing to defeat his power to sell, though it be distinct from the first. Semb. per three J. 3 Lev. 46.

So, a covenant shall be construed according to the import of the words; as, if a lessor covenants, that the lessee shall enjoy without interruption, except by the king, his heirs or successors; an interruption by a patentee shall be a breach, for he is not excepted. R. Cro. El. 517, 8. Vide Condition, (E—G 12, &c.—M 1, &c.)

[*With respect to covenants between landlord and tenant.*—If there is a proviso in a lease, giving the son of the lessor a power to take the premises when he comes of age, he must, on coming of age, make his election within a reasonable time. 2 T. R. 436.]

[There is a covenant by the lessee of a coal mine, to pay half of all such sums as the cannel to be gotten by virtue of the lease should sell for at the pit's mouth. Held, that nothing was payable for cannel sold by the lessee elsewhere than at the mouth of the pit. 5 T. R. 564. 7 T. R. 676.]

[Under a covenant by the lessee of a coal mine, to pay a moiety of all such sums of money as the coals there raised should sell for at the pit's mouth, he is not liable to pay a moiety of the money produced by the sale of coals elsewhere. 7 T. R. 676; reserving the judgment of C. B. in 1 B. & P. 524.]

[Under a covenant (uncontrolled) that "the tenant should not cut coppice of less than ten years growth; but at the end of the term the landlord agreed to pay to the tenant the value of all such growth of coppice as should be then standing and growing;" the word such refers not to a growth of ten years, but under ten. 13 East, 80.]

[A proviso in a lease, that "when and so often as" the lessee should intend during the term to sell the timber, &c. he should give the lessor notice, that he might have the refusal of it, is discharged as to the then growing timber, by the tenant notifying a *bona fide* intention to cut down the whole of the timber, and refusal by the lessor to purchase. 16 East, 87.]

[Setting up a school is a "business," within a proviso in a lease not to exercise any trade or business whatsoever. 1 M. & S. 95.]

[Land is leased with a covenant by the lessee, that "if the lessor should be desirous, during the term, to take all or any part of the land demised for [*276]

building thereon, it should be lawful for the lessor, or his assigns, to enter and come into and upon all or any part of land to make such buildings as he should think proper, and generally to do all such acts as should be requisite and necessary in any such case, without interruption by the lessee, giving the lessee a certain notice; the lessor paying, for every acre taken, a certain rent." Held, that the fair construction of this covenant was, that the lessor having a *bona fide* intention of building, or letting the premises to another for building, might, by the required notice, determine the lease altogether, for the portion claimed. 2 M. & S. 541.]

[A covenant with the lessor, his heirs and assigns, to supply them with as much wheat, at a stipulated price, as they should want in their family, had been preceded by a covenant to bring, yearly, coals to their dwelling-house. [*]Held, that the former covenant, as well as the latter, was local. 2 B. & P. 565.]

[A termor, with liberty to dig for brick earth, covenants not to dig for more than half an acre in each year; or if he did, to pay so much for each half acre, "being after the rate that the whole brick earth was thereby sold, or intended to be sold." Held, that he was entitled to recover after the same rate from a stranger who took brick earth from the premises. 1 Taunt. 183.]

[Land in clover sown with corn is in a state, not of pasture, but of tillage. 3 Taunt. 469.]

[The plaintiff demises a public-house to the defendant; the defendant to take all his malt of the plaintiff. The plaintiff upon every reasonable request, to deliver good malt; and if he did not, the defendant to be at liberty to buy it of any other. Breach, that the defendant used a quantity of malt not bought of the plaintiff, and without requiring the plaintiff to deliver such. Plea, that the plaintiff had delivered bad malt to the defendant, who thereupon bought malt of others. Plea held bad. 1 Mars. 505. 6 Taunt. 154.]

[A. grants a lease to B. of certain tenements, and covenants, that if he, his heirs or assigns should, during the said term, have any offer made for the disposal of certain land adjoining the demised premises, he or they should not dispose of the same, without previously offering it to B., his executors, administrators, or assigns, at 5*l.* per cent. less than such offer. Before the expiration of the lease, A. sells to C. upon one entire contract, and for one entire sum, the whole of his estate, comprising, amongst other property, the demised premises, and the ground which was the subject of the covenant, without making any offer of the latter to B. Held, that this was no breach of the covenant, either absolute or implied, on the part of A. 2 Mars. 1. 6 Taunt. 224.]

[Covenant within the first two years of a term completely to repair four demised messuages, and within the first fifty years to take down the messuages, as occasion should require, and in place thereof, erect four other messuages; satisfied by putting the four ancient houses into condition completely as good as new houses. 7 Taunt. 411.]

[If the party having the beneficial interest in a lease determinable on lives, covenant, on the dropping of a life, to endeavour to procure a grant from the lord to add a new life, he may put in his own. 1 B. & P. 455.]

If a covenant be, that he shall not be evicted during the term; if the lease be by indenture, 1st May, for nine years next, an eviction after the lease commenced in computation will be a breach, though it was before the delivery. R. 1 Sid. 374.

If a condition of an obligation be, that he permit his wife to devise 100*l.*

to be paid out of his personal estate, &c. he ought not only to permit the devise, but to pay the legacy. R. per three J. 2 Rol. 247. l. 50.

Covenant that he will not interrupt B. in the enjoyment of a close ; if he erects a gate which interrupts, it will be a breach, though he has a right to erect it. R. 8 Mod. 319.

If a joint-tenant grants *totum statum* in a mill (by which a moiety passes) and the survivor, supposing that he has the whole by survivorship, [*]grants *totum molendinum*, with a covenant that the lessee shall enjoy without interruption by him ; it will be a breach, for the covenant extends to the whole mill. R. 2 Cro. 233.

So, the words of a covenant shall be restrained to the meaning of the phrase at the time of the covenant ; as, if a bishop, anno 1635, covenants to pay all taxes during the term ; this shall be restrained to synodals, &c. then usually paid, and does not extend to taxes by parliament, anno 1665. R. 2 Lev. 68.

If a lessor covenants to indemnify the lessee from all duties, charges, and taxes to be imposed on the land, except tithes ; it does not extend to the poor's rate, which is not a charge upon the land, but upon the person in respect of his ability. R. F. g. 297.

But a covenant to pay so much, clear of all taxes, extends to parliamentary taxes. R. per three J. Holt cont. 1 Sal. 221.

And the words of a covenant shall not be extended to things of common right, if they be otherwise satisfied ; as, a covenant that land shall be discharged of all rents, does not extend to a rent-service. 3 Leo. 44.

So, restrictive words in the beginning or end of a sentence, which in good sense may be applied to several sentences, shall extend to them all. 1 Sand. 60.

[A. After granting certain premises in fee to B. and after warranting the same against himself and his heirs, covenanted, that notwithstanding any act by him done to the contrary, he was seised of the premises in fee, and that he had full power, &c. to convey the same. He then covenanted for himself, his heirs, &c. to make a cartway, and that B. should quietly enjoy, without any interruption from himself or any person claiming under him ; and lastly, that he, his heirs, and assigns, and all persons claiming under him, should make farther assurance. It was holden, that the intervening general words " full power, &c. to convey," were either part of the preceding special covenant, or, if not, that they were qualified by all the other special covenants of the grantor, against the acts of himself and his heirs. 2 Bos. & Pull. 13.]

[A. being possessed of a lease for years, covenanted in an indenture for making a family provision, that if he should die during the continuance of the term of the lease, his executors, &c. should assign the residue to B. A. afterwards purchased the reversion in fee, and died. And it was holden that A. did not, by the terms of the covenant, intend to preclude himself from purchasing the fee, and that his executors were not liable on the covenant. 2 Bos. & Pull. 63.]

But several and distinct covenants shall not be restrained the one by the other ; as, if B. covenants, that notwithstanding any act by him, he has good power to convey for a jointure, and that the lands conveyed are of the value of 200*l.* ; the latter covenant is absolute, and not restrained to any act by him. R. Jon. 403. Lit. 185. in marg.

If A. covenants with his lessor, that he will pull down three messuages, and erect three new ones, and that he *omnia messuagia fore erect.* will leave
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well repaired at the end of term ; if he erects four messuages where he pulled down the three, he ought to leave the four well repaired : for the latter covenant is distinct, and not restrained by the former. R. 2 Vent. 128. 3 Lev. 265.

[*]If a covenant be, upon reasonable request to surrender such an estate to B., and also to permit him to enjoy the profits ; he ought to permit the taking of the profits, without request, for they are distinct clauses. R. 2 Rol. 248. l. 50.

If A. covenants, that he has a good estate in fee, and that he has power to convey notwithstanding any act by him, &c. the former covenant, that he has a good estate, is not restrained by the words, notwithstanding any act. R. 2 Rol. 250. l. 5.

So, though the covenants are not distinguished by distinct clauses, if they be several in their nature ; as if a lease for years, if A., B., and C. so long live, be assigned to D., with a covenant, that he has a sufficient estate for the residue of the term, if A., B., and C. shall so long live. and they are yet in life ; though he does not say, and that they are, &c. yet it is a distinct covenant, and it will be a breach if any of them was dead. R. 2 Rol. 249. l. 10.

If A. covenants that he and his wife will levy a fine to B. and C., and their heirs, and at their charges ; the latter words make a distinct covenant, for A. cannot covenant to levy a fine at the charge of the conusees. R. 2 Rol. 251. l. 5.

So, words in the middle of a sentence cannot in good sense be extended to other sentences : as, if A. covenants to deliver a terrier of his lands, and to make oath upon request of the truth of it, and to deliver the original lease ; there is no need of a request for the delivery of the lease. R. 2 Rol. 250. l. 10.

[General words at the beginning of covenants by the lessee, " jointly and severally in manner following," extend to all the subsequent covenants. B. R. H. 34 Geo. 3. 5 T. R. 522.]

[Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award ; the arbitrator awarded each of the two to pay a certain sum to the third ; and it was holden that they were jointly responsible for the sum awarded to be paid by each. B. R. T. 37 Geo. 3. 7 T. R. 352.]

[Deeds have always been construed more strictly than wills. 3 T. R. 765.]

[Stops are never inserted in acts of parliament or in deeds ; but the courts of law, in construing them, must read them with such stops as will give effect to the whole. Per Ld. Kenyon, C. J. B. R. M. 31 Geo. 3. 4 T. R. 66.]

[Where several persons covenant severally in respect of a joint interest, the covenant is joint notwithstanding the words *cum quolibet eorum*. C. P. H. 14 Geo. 2. Willes, 248. 7 Mod. 345.]

[Introductory words in a deed may make the subsequent covenants, in their terms several, joint as well ; unless the subject requires that the introduction be confined to particular covenants. 5 T. R. 522.]

[A covenant with A. and B. to pay an annuity to A. and his executors, during B.'s life, belongs to both jointly, though the benefit be to A. alone, therefore, on the death of A., the legal interest therein survives to B. 1 East, 497.]

[A. being a tenant for life of premises in ward of the court of chancery, [*]an indenture was made between himself of the first part, B. the receiver of the rents and profits appointed by the court of the second, and C. of the third, whereby A. devised the premises to C., and C. covenanted with B. and A., and with every of them to repair: A. died; and held that the words "with every of them," meant with both jointly, and therefore, that the covenant survived to B. 3 Taunt. 87.]

(E) BREACH OF COVENANT.

(E 1.) What shall be.

What shall be a breach of a covenant to make assurance. Vide Condition, (H).

What, a breach of a covenant to keep indemnified. Vide Condition, (I).

Of a covenant for enjoyment, without interruption or molestation, it shall be a breach, if the covenantor prosecutes him in a court of equity. R. cont. Mo. 859. Semb. 2 Vent. 213. Vide Condition, (M 1.—Q.)

{ So if there be a lawful eviction of the grantee. Greenby v. Wilcocks, 2 Johns. Rep. 1.

So a tortious entry by the covenantor is a breach of a covenant for quiet enjoyment. Sedgwick v. Hollenback, 7 Johns. Rep. 376.

A covenant for quiet enjoyment goes to the possession, and not to the title; and is broken only by an actual entry upon, and expulsion from the premises, or some disturbance in the possession. Waldron v. M'Carty, 3 Johns. Rep. 471. Kortz v. Carpenter, 5 Johns. Rep. 120. Ker v. Shaw, 13 Johns. Rep. 236. Whitbeck v. Cook, 15 Johns. Rep. 483.

But it seems, that an action will lie on a covenant for quiet enjoyment, where it was assigned as a breach, that a judgment was outstanding against the grantor, at the time of executing the deed, which was satisfied by the grantee. Hall v. Dean, 13 Johns. Rep. 105. Vide Waldron v. M'Carty, 3 Johns. Rep. 471. Delavergne v. Norris, 7 Johns. Rep. 358. }

If the covenantor himself wrongfully disturbs him. Vide Condition, (G 12.—M 1.)

Otherwise, if a stranger interrupts wrongfully, without title. Vide Condition, (E).

[In a lease, the lessor reserved a right of entering and cutting timber, making reasonable satisfaction to the lessee for any damage thereby occasioned to him; covenant does not lie by such lessee for any wrongful act of cutting down by a third person, if done without the consent or authority of the lessor, however he might afterwards countenance the act. B. R. M. 35 Geo. 3. 6 T. R. 66.]

If a lessor covenants with the lessee, that the land shall continue to him of the value of 200*l.* during the term; it will be a breach, if the lessor ousts him, for then it cannot continue of such value. R. Jon. 360.

If a husband seized in right of his wife, covenants, that he and his wife have a right to assure, it shall be a breach if the wife be within age. R. 2 Jon. 195, 6.

So, if a covenant be to convey free from incumbrances; it shall be a breach if he makes a fraudulent conveyance, though it is void as to a purchaser by the st. 27 El. 4. R. 2 Cro. 131.

So, if it be, that the land is free from all incumbrances; a grant by copy of the same land will be a breach. Sav. 74.

So, if a covenant be, that land shall be *clare exonerata ab omnibus priori-* [*280]

bus titulis jur. & oneribus, &c. if there was a former lease to the feoffee *quamdiu sola manserit*, and that if she married, her son should have it; if the feoffee marries, and the son enters, it shall be a breach of covenant, though the charge was future and contingent. R. 1 Leo. 93.

So, if a covenant be, that the land is discharged, and a rent-charge was before granted to commence at a day to come. 1 Leo. 93.

[If a master of a ship, covenant to go to a certain place, there to receive a merchant's goods, provided that if his ship should not be arrived [*]there before such a day, it shall be at the merchant's option to load the ship or not; it shall be a breach in the master not to go, notwithstanding the proviso. 3 Burr. 1637.]

{ If a tenant covenants to build, and leave buildings in good tenantable order and repair, at the end of the term, it is a breach, if the buildings are destroyed by fire. *Pasteur v. Jones*, Cam. & Nor. 194.

Upon a covenant by three, to make a deed with warranty, the deed of one, with a release of the other two, is not a performance. *Lawrence v. Parker*, 1 Mass. Rep. 191.

A covenant of warranty in a deed of conveyance may be broken by an actual eviction, or ouster by a paramount title. *Bearce v. Jackson*, 4 Mass. Rep. 408. *Mackey v. Collins*, 2 Nott & M'Cord, 186.

And if the covenantor be not seised in fee of the whole premises granted, but other persons are seised of an undivided part of them, it is a breach of the covenant of seisin. *Sedgwick v. Hollenbeck*, 7 Johns. Rep. 376.

If a mortgagor in possession convey land, with covenant of seisin, the existence of the mortgage is not a breach. *Stannard v. Eldridge*, 16 Johns. Rep. 254.

If a party yield the possession of land to one who has a paramount title, it shall be deemed equivalent to an eviction by judgment of law. *Hamilton v. Cutts*, 4 Mass. Rep. 349. *Gore v. Brazier*, 3 Mass. Rep. 523.

But if the title to which the grantee yields be not good, he must sustain the loss; and in a suit against his warrantor, the burden of proof will rest on the plaintiff; but it is otherwise if the eviction is by judgment of law, because the judgment is conclusive. *Hamilton v. Cutts*, *ubi supra*.

A covenant that land free from all incumbrances, is broken immediately by any subsisting incumbrance. *Prescott v. Trueman*, 4 Mass. Rep. 627.

So the covenants in a deed of conveyance, that the covenantor is seised in fee, &c. when in fact he has no right or title, are broken immediately upon the execution of the deed. *Marston v. Hobbs*, 2 Mass. Rep. 433. *Bickford v. Page*, 2 Mass. Rep. 455. *Caswell v. Wendell*, 4 Mass. Rep. 108. *Greenby v. Wilcocks*, 2 Johns. Rep. 1. *Hamilton v. Wilson*, 4 Johns. Rep. 72. *Abbott v. Allen*, 14 Johns. Rep. 248.

So on the sale of a slave, the defendant covenanted to warrant him against all claims, &c. it is a breach of the covenant that the person sold was not a slave. *Quackenboss v. Lansing*, 6 Johns. Rep. 49. }

(E 2.) If the thing be prejudiced before performance.

If a man acts contrary to the intention of the covenant, it shall be a breach, though he performs the words of the covenant: as, if a covenant be to deliver a recognizance to be cancelled; it is a breach if he extends it before, though it be afterwards cancelled. R. Ray. 25. 1 Sid. 48. Vide Condition, (M 1).

If a brewer covenants to deliver all his grains for the cattle of the plaintiff, and he puts hops to them before delivery. R. Ray. 464.

If a man covenants to leave all the trees upon the land, and he cuts them down, and leaves them there. Ray. 464.

So, it shall be a breach of covenant, if the covenantor be disabled to perform. Vide Condition, (M 2, &c.)

{ And thus, if one covenants to assign to another a judgment, and before the time when the act is to be performed, releases the judgment, it is a breach of covenant. Hopkins v. Young, 11 Mass. Rep. 302. }

(E 3.) What not.

But a covenant shall not be broken, if a man does an act, which by consequence may be a breach, if the breach does not actually follow; as, if A. covenants to maintain every action in her name, without release or countermand; if A., after an action commenced, takes husband, it is not a breach, though the writ be abateable, if it be not abated by judgment. R. 1 Leo. 169.

[A covenantor cannot, by adopting an act which he did not previously direct, make himself liable as for a breach of covenant. 6 T. R. 66.]

If A. covenants that B. shall enjoy a lease assigned, free from arrears of rent; if rent be in arrear, it shall not be a breach, where no damage accrues thereby to B. by suit, or otherwise. R. 1 Sal. 196.

So, if an obligation be, to indemnify from rent in arrear, or money due by obligation after the arrears incurred, or the obligation broken. 1 Sal. 197.

So, a collateral thing shall not be a breach, though it be within the words of the covenant: as, if A. covenants that B. shall enjoy without any molestation; a suit in chancery against him to stay waste, is no breach, though the bill be dismissed; for it is a collateral thing. R. 2 Vent. 214.

So, a covenant shall not be broken by a subsequent act, to which the words do not extend; as, if a covenant be, that A. shall enjoy free from prior incumbrances, except estates for the life of B., and B. afterwards grants by copy for three lives, for though this extends beyond the life of B. it is not a prior incumbrance. R. Sav. 74.

So, a covenant shall not be broken by a thing which happens by the act of God, if it be repaired in convenient time: as, if a lessee covenants to repair a wall against a river, so that a meadow shall not be overflowed; if by an outrageous and sudden flood, the wall be thrown down and the meadow overflowed, it is not a breach, if it be repaired in due time. Per two J. Dy. 33. a.

[So, where a covenant is merely negative and passive, some act must [*]be done to constitute a breach; as non-feazance only is not sufficient. 1 Rol. Abr. 425. pl. 45. 1 Rol. 430. pl. 16. 3 Leo. 38.]

[Therefore, where defendant had covenanted to permit the plaintiff in the last year of the term to sow clover among the barley and oats sown by the defendant; and the latter sowed barley and oats the last year, but gave no notice to the plaintiff, this was held no breach. Doug. 125.]

[Where lessee has covenanted not to assign, set over, or otherwise put away the lease or premises demised, it is no breach to make an underlease of part of the term. 2 Bl. 766. 3 Wils. 234.]

So, a covenant to do an unlawful thing shall be void: as, to permit his escape. Hob. 14.

To indemnify from an escape, which he has permitted. Ibid.

[The lessee of a coal mine, who covenants to pay a certain share of all such sums of money as the coal shall sell for at the pit's mouth, is not liable under that covenant to pay to the lessor any part of that money, which may

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be produced by sale of the coals elsewhere than at the pit's mouth. B. R. E. 34 Geo. 3. 5 T. R. 564. B. R. T. 38 Geo. 3. 7 T. R. 676. C. P. E. 36 Geo. 3. 1. Bos. & Pull. 522. contra.]

[If the breach of a covenant be assigned thus; "that the defendant has not used the farm in an husbandlike manner, but on the contrary has committed waste," the plaintiff cannot give evidence of the defendant's using the farm in an unhusbandlike manner, if it do not amount to waste. B. R. T. 29 Geo. 3. 3 T. R. 307.]

[A covenant to surrender a copyhold to a purchaser, and to make and do all acts and deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by nonpayment of the fine to the lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due until after. 1 East, 632.]

(F) COVENANT, HOW DEFEATED.

If the foundation of the covenant fails, the covenant also fails: as, if a lease be agreed on and the lessee executes his part, but the lessor does not execute his part, whereby there is not any lease; the covenants in the indenture sealed by the lessee, and also the bond for performance of covenants are void. R. Yel. 18.

[See as to whether a covenant is discharged by the misfeazance or omission of the covenantee. Dougl. 272. 684.]

{ In an action of covenant, the defendant, under the general issue, may give in evidence, the parol assent of the covenantee, to the non-performance. *Burden v. Skinner*, 3 Day, 126.

A covenant by a person hiring a slave, to return him at the end of the year, is defeated by his death, although the death be occasioned by the cruel treatment of the overseer. *Harris v. Nicholas*, 5 Munf. 483. }

So, if a lease be made, and afterwards surrendered, the covenants contained in the lease become void. Yel. 19.

[Covenants, as far as they depend upon a reversion, are extinguished by a merger of that reversion. R. 3 T. R. 393.]

So, if a lease be void, the covenants contained in the lease, and the bond to perform the covenants, are also void: as, if a man grants so much of a term as shall be at his death, and the grantee assigns it; the grant being void for uncertainty, the covenants in the assignment are also void. R. Ray. 27. R. 3 Lev. 193. 1 Lev. 45.

[So, if the committee of a lunatic make a lease, the covenants are void, for he cannot make a lease. 2 Wils. 130.]

{ A. and B. claimed title to the same lands, under different patents, B. released to A. his title to the land; held, that A., by accepting the release, was estopped from alleging that the land released to him, did not lie within the patent under which B. claimed, or that the defendant was not seised of the land, in consequence of the prior seisin of the plaintiff under the patent by which he claimed. *Fitch v. Baldwin*, 17 Johns. Rep. 161.

To dissolve a covenant some act of equal solemnity must be shewn. After a breach, accord and satisfaction is a good plea. *Harper v. Hampton*, 1 Har. & Johns. 673.

How far a release not under seal, will operate to discharge a breach of a covenant under seal. *Ibid.* }

[*]So, if a lease be executed by tenant for life, the reversioner, who is

then under age, being named therein, but not executing it, it shall be void on the death of tenant for life, and an execution afterwards by the reversioner is no confirmation, so as to bind the lessee in an action of covenant. 1 Term Rep. 86.]

So, if tenant for life, or in tail, leases for twenty years, and covenants by *demisi*, and dies within the term, covenant does not lie. R. 1 Leo. 179.

So, if a lease be extended for the king's debt, a covenant to pay the rent to the lessor is void. Sav. 132.

If a lessor ousts his lessee, he shall not have covenant against him for the rent.

Nor against A. who gave a bond, that the lessee should pay for the occupation of the lands. R. 3 Leo. 159.

So, if an obligation be for performance of such and such covenants in an indenture, part of which are void by the st. 5 Ed. 6. 16. against buying of fices, an action does not lie : for though part of the covenants may be lawful, the obligation shall be void for the whole. R. Cro. El. 529.

So, in all cases, where part of the condition is void by statute. R. Hob. 14.

[A distinct covenant in a lease is not avoided by the illegality of another. 11 East, 165. 13 East, 87.]

[A covenant not to marry any other woman, and if he does, to pay plaintiff 1000*l.*, is a restraint of marriage, illegal and void ; and if on plea of *non est factum*, there is verdict for plaintiff, judgment shall be arrested. P. 8 Geo. 3. Affirmed in Exchequer Chamber, p. 1770. 4 B. M. 2225.]

But where part is void by the common law, and other part is good, the obligation shall be good. R. Hob. 14. Mo. 856. R. Cart. 230.

But if a lease becomes void, covenant lies for a covenant broken before : as, if a lease be upon condition to be void for non-payment of rent, an action lies for rent due before. Cro. El. 78. R. Cro. El. 244.

So, if a parson makes a lease, and afterwards becomes non-resident, he shall have covenant for a breach before. Cro. El. 78. 245. Dub. Dy. 373. a. but there acc. per Nich. in marg.

So, covenant lies for a breach in non-performance of a thing, which makes the lease void ; as if a man covenants by indenture to give a bond, &c. Proviso that upon failure the indenture shall be thenceforth void ; covenant lies for not giving the bond, for the intent was, that it should be void as to all covenants *in futuro*. R. Cro. El. 77.

So, if a lease be void, covenant lies upon a collateral thing : as, if a dean and chapter lease to A. and afterwards lease to B., and covenant that they have power to lease ; covenant lies, though the lease to B. was void, for it was broken immediately by the making of the lease. R. Ow. 136. 2 Dan. 228. 1 Brownl. 21.

So, covenant that the lessee shall enjoy, shall be indemnified, &c. Ow. 136.

So, if a bargain and sale be to A. and his heirs, upon condition to be void, upon payment by the bargainor of so much money, and he covenants that he will pay ; though the deed be void for not inrolling within [*]six months, A. shall have covenant for nonpayment of the money. R. Sal. 199..

So, if there be a covenant to do a lawful thing, and afterwards by act of parliament the thing be prohibited, the covenant shall be defeated. R. 1 Sal. 198. R. cont. 3 Mod. 39.

So, if a covenant be, that he will not do what a statute afterwards requires him to do. 1 Sal. 198.

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But if a covenant be, that he will not do a thing then unlawful though a statute afterwards makes the thing lawful, the covenant is not repealed. 1 Sal. 198.

So, if a covenant be to find eight men to grind at a mill, and that the lessee shall deduct it out of his rent; if the lessee makes it a horse-mill, by this alteration the covenant is discharged. R. 2 Cro. 182.

[If A. and B. covenant in a lease for 61 years, that at any time within one year, after the expiration of 20 years of the said term of 61 years on the request of the lessee, and his paying 6l. to the lessors, they would execute another lease of the premises to the lessee, for and during the further term of 20 years to commence from and after the expiration of the said term of 61 years, &c. And so in like manner, at the end and expiration of every 20 years, during the said term of 61 years, for the like consideration, and on the like request, would execute another lease for the further term of 20 years, to commence at and from the expiration of the term then last before-mentioned, &c. under this covenant, the lessee cannot claim a further term of 20 years in the lease, if he have omitted to claim a further term at the end of the first and second 20 years of the lease. 1 Term Rep. 229.]

[A perpetual covenant, never to take advantage of a covenant, is a release for avoiding a circuitry of action. 1 Ld. Raym. 420. 690.]

[Covenant for payment of money cannot be discharged without deed. 2 Wils. 376. Nor can independent covenants be set off against each other. Lofft. 198.]

(G) COVENANT TO STAND SEISED.

(G 1.) When it shall be good.

[For title.—A., by indenture granted to B. certain premises in fee, and warranted them against himself and his heirs, and covenanted that he was, notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee simple, and that he had a good right, full power, and lawful and absolute authority to convey. He then covenanted for himself, his heirs, &c. to make a cartway, and for quiet enjoyment, without interruption from himself, or any person claiming under him; and lastly, that he, his heirs and assigns, and all persons claiming under him should make further assurance. Held, that the intervening general words “full power, &c. to convey,” were either part of the preceding special covenant, or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. 2 B. & P. 13.]

[The general words of a covenant by the vendor, that “he has good right, full power, and lawful authority to convey,” are not restrained by adding, “and that he has not by any means, directly or indirectly [*]forfeited any right or authority he ever had, or might have had over the same.” 3 B. & P. 565.]

[If a lessee be evicted by title paramount, the value of the unexpired interest in the term is not, it seems, to be included in the damages recoverable from the lessor on his covenant for title. 3 T. R. 665.]

[By the rule *caveat emptor*, an undertaking for title is not an implied term of an agreement to lease. 3 Taunt. 433.]

[No implied covenant against eviction by title paramount arises out of the word “demise,” where there is an express and qualified covenant for quiet enjoyment. 4 Taunt. 329.]

[The recital in the assignment of a term was, that the premises were de-

mised for the term of ten years, and that by assignment in the following year, they vested in the assignor for the remainder of the said term. The *habendum* was, for and during all the rest, &c. of said term. The covenants were :—1. That the assignor had not incumbered, except by an under-lease of part.—2. That the lease was valid of and for the said premises thereby assigned, and not become void or voidable.—3. Against the acts of the assignor, and those claiming under him. The second covenant is not qualified by the third. 15 East, 530.]

[*For quiet enjoyment.*—A covenant for quiet enjoyment against the interruption of any person whatsoever, only extends to lawful interruptions. 3 T. R. 584. Lofft. 460.]

[The general words of a covenant for quiet enjoyment are not, in necessary construction, to be qualified by the language of those for title and right to convey. 11 East, 633.]

[A covenant for quiet entry and enjoyment imports, that the covenantee shall enter and enjoy in his own right; therefore, it is broken if another has title to the premises, though, in point of fact, the covenantee, had he entered, might not have been disturbed. 6 T. R. 458.]

[A covenant for quiet enjoyment, without the lawful interruption of the covenantor, imports that he will not claim title to the premises; therefore it is broken by his entry asserting a right that he has no title, but not by an accidental trespass, since then there is no assertion of right. 1 T. R. 671.]

[A covenant by the vendor against interruption through his default, applies to charges upon the premises, which, though not imposed by him, he might have paid off. 3 East, 491.]

[A covenant for quiet enjoyment is broken by the eviction of one having title paramount, though his right is not established by action at the suit of the covenantee. 4 T. R. 617.]

{ So in covenants of seisin and warranty. Booth v. Starr, 5 Day, 419. }

[If there is a power for husband and wife jointly to declare the uses of a fine of the wife's estate, and the husband covenants with a lessee for quiet possession against any person claiming under the husband, his executors shall be liable, if the lessee is evicted by a remainder-man claiming under a joint execution of the power. Dougl. 43.]

If a man covenants or agrees for him and his heirs, with another and his heirs, that upon such consideration the other shall have his lands or tenements; though the land does not pass for want of livery, &c. yet the covenantee shall have the use and profits, and now the possession is executed to the use by the st. 27 H. 8. 10. Pl. Com. 301. b. 303. a. Vide Bargain and Sale, (B 1, &c.)

[*][An instrument not under seal cannot operate as a covenant to stand seised. 2 T. R. 684.]

Though he covenants, that at a future day, as next Easter, &c. he will stand seised. R. 2 Cro. 180. Vide Uses.

Though the covenantor was seized only in reversion, or remainder. 2 Co. 15. a.

But such covenant ought to be by deed; for an use shall not be raised by parol. Adm. cont. Pl. Com. 303. a. Dub. Cro. El. 345. R. acc. Mo. 688. Poph. 48. 50. R. per. tot. cur. Dy. 296. b. R. sæpe Rol. 788. l. 20. R. sæpe 1 Vent. 140. R. 1 Sid. 26. 82. Vide ante, (A 1.)

So, it ought to be a covenant with another and his heirs; for otherwise it is but a personal covenant, which does not raise an use. D. 1 Sid. 26.

And with a person capable: for with his wife is not good. 2 Rol. 788. l. 40. Co. L. 112.

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So, the covenantor ought to be seised at the time of the covenant, otherwise he cannot stand seised to the use of another; and therefore, a covenant to stand seised of lands, which he shall afterwards purchase, is void. R. Mo. 342. R. 2 Rol. 790. l. 30. 40. R. Cro. El. 401. Win. 60. F. g. 237.

Or, of such land in particular, which he shall then after purchase. 2 Rol. 790. l. 37.

So, if a joint-tenant covenants to stand seised of the moiety of his companion after his death, it is void, though he survives. R. 2 Rol. 790. l. 45. Mo. 776.

Or, if one covenants to stand seised of so much land as is worth 20l. per ann. R. Het. 147.

[But a man seised may covenant to stand seised to the use of another after covenantor's death. T. 30 & 31. G. 2. 2 Wils. 75. Willes, 682. S. C.]

[A. in consideration of natural love and of 100l., by deeds of lease and release, granted, released, and confirmed certain premises after his own death to his brother B. in tail, remainder to C. the son of another brother of A. in fee; and he covenanted and granted that the premises should after his death be held by B. and the heirs of his body, or by C. and his heirs, according to the true intent of the deed. It was holden that the deed could not operate as a release, because it attempted to convey a freehold *in futuro*, but that it was good as a covenant to stand seised. Ibid.]

So, the covenant ought to be, that he himself will stand seised, &c. though the uses do not arise until after his death; for a covenant that his heir shall stand seised is not good. Per Hob. 313.

Or, that he will levy a fine to his son, who shall stand seised, &c. R. 3 Lev. 306.

(G 2.) By what words.

So, there ought to be apt words and a manifest intent: and therefore, if the words are future and obligatory, and not *in presenti* and declaratory, no use arises. D. Ray. 48. Win. 36. 60. Adm. Pol. 535.

So, if the words seem intended for another purpose; as if a man [*]covenants, that another shall enjoy free from incumbrances; it does not amount to a covenant to stand seised. R. 1 Sid. 26. Adm. Ray. 48.

So, articles of agreement by which a man covenants, grants, bargains, and sells, &c. do not amount to a covenant to stand seised; for they are only preparatory to a subsequent conveyance. R. Ray. 43. 1 Sid. 82.

So, a covenant to levy a fine, which and all fines shall be, and the covenantor shall stand seised, to the use of B., does not amount to a covenant to stand seised. R. 3 Lev. 126. Adm. Win. 36.

So, articles, by which a mother grants and demises to her son. 2 Lev. 214. R. Lev. 56.

So, a covenant to levy a fine to a son, and that the land shall remain to a son free from incumbrances. R. 3 Lev. 306.

To make an estate to A. and B. and that all estates shall be to the use of the same indenture. R. Dal. 112.

So, if the intent of the covenantor appears uncertain: as, if a man, in consideration of marriage, covenants that land shall descend, remain, and come, &c. for it does not appear, whether he intends that he shall have it by descent, or by way of remainder. 2 Rol. 788. l. 50. Vide 2 Lev. 77. R. Bend. pl. 153. 1 And. 25.

So, if he covenants, or gives, and grants land after his decease; for it

does not appear that he intended to make himself tenant for life. R. 2 Rol. 788. l. 45. 789. l. 5. R. 1 Sid. 3. Semb. cont. 2 Lev. 77. 226.

So, if for affection he gives or grants lands, of which he was seised in reversion after an estate for life to B. and his heirs, to the use of D. and his heirs; for the use is not limited to B., but was intended to arise out of his estate, which cannot be. R. 1 Sid. 26. R. 2 Vent. 319.

If *cestui que use* in tail, 14 H. 8., covenants, that he or his feoffees will not make an estate, levy a fine, &c. but that the lands, after his death, shall descend to his son; this does not raise an use, but is a covenant only. 3 Leo. 6. Bend. pl. 153.

So, if another sort of conveyance seems intended, it shall not be construed to be a covenant to stand seised: as, if a man gives or bargains and sells land to his son, without more; no use arises by way of covenant. Cro. El. 394. Semb. 2 Cro. 127.

If he covenants, that after his death the land shall remain and be to his son, and his wife. R. Win. 60. R. Cro. El. 279.

So, if a man makes a charter of feoffment, with a letter of attorney to make livery, and livery is not made; it does not operate by way of covenant. 8 Co. 94. R. cont. 2 Lev. 213.; but there was a blank for the name of the attorney.

So, if by deed inrolled, in consideration of marriage, he grants, gives, and confirms, and inserts a letter of attorney to make livery. Agr. 2 Rol. 787. l. 12. Cont. 2 Lev. 213. Adm. Pol. 532.

[Yet if the covenantor is seised in fee, and there are apt words (as grant) a plain intent, and a proper consideration (as naming one, the eldest son of his well-beloved uncle), a release (void as such, because a grant of freehold to commence *in futuro*) shall take effect as a covenant to stand seised. T. 30 & 31 G. 2. 2 Wils. 75.]

[*] Yet the word covenant is not necessary, if there be words equipollent. 1 Vent. 140. 2 Rol. 789. l. 30.

And therefore if a man, in consideration of marriage, gives, grants, and confirms land to A. and his heirs, to the use of him and his heirs, it shall be good by way of covenant. R. 2 Rol. 787. l. 5. R. 3 Mod. 237.

If A. seised in fee, in consideration of marriage to be had between him and B. by indenture between A. one part, and B. and C. other part, gives, grants, enfeoffs, aliens, and confirms to B. and C. and their assigns, the lands then in his possession, *habend.* to the use of B. for life, remainder to the heirs of her body by A., who covenants the lands shall remain to the said uses, clear of charges; this shall operate as covenant to stand seised, and B. has an estate in special tail, A. an estate for life by implication, and the reversion in fee. T. 28 & 29 G. 2. 2 Wils. 22.]

{ The words "give and grant," shall operate as a covenant to stand seised. *Den ex dem.* Slade v. Smith, 1 Hayw. 251. }

So, if a father, for natural affection, gives land to his son; though livery be indorsed and not executed. Ray. 46.

[If a father by deed, in consideration of natural love, grant lands after his decease to his two children, it is a covenant to stand seised. H. 1750. 2 Vesey, 252.]

So, if for affection he grants and assigns a rent in fee; though this be a conveyance at common law. Ray. 48. 2 Vent. 150. R. 3 Lev. 372.

So, if he grants, bargains, sells, enfeoffs, and confirms land; though there be a clause of warranty in the deed, and a covenant for enjoyment when the estate shall be executed. R. 1 Vent. 137. 1 Mod. 175. 2 Lev. 10,

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So, in all cases, where the intent appears, that the covenantee shall have the estate, if the deed be defective, it shall be construed a covenant to stand seised : as, if a son covenants, that if he dies without issue, he gives and grants the land to his mother. R. 2 Lev. 226. 3 Lev. 372. 2 Jon. 105. Pol. 527. Carth. 39.

If a man gives and grants a rent to A. and his heirs, *habendum* after his death, if he dies without a son then living. R. 3 Lev. 370.

If he covenants, that after the death of him and his wife the land shall descend and be to his son and his wife. Semb. Win. 37.

If he enfeoffs trustees, and grants to them to stand seised to the use of his brother, and there be no livery. 1 Ver. 141. But there was in the deed an express covenant that the cestuique trust should enjoy.

[A., in consideration of an intended marriage with B., gave, granted, and conveyed certain lands to B. and C. and their assigns, to hold to the use of B. and her assigns for life in bar of dower, and then to the use of the heirs of the body of B. by A., remainder over ; and covenanted that the premises should remain to the uses and intents aforesaid. It was holden that this deed operated as a covenant to stand seised ; and that an only child of the marriage was entitled, after the deaths of A. and B. Willes, 673.]

{ A grant in fee, with a proviso reserving a life estate, is a covenant to stand seised. Den *ex dem.* Sasser *v.* Blyth, 1 Hayw. 259. Vide Barrett *v.* French, 1 Conn. Rep. 354. Jackson *v.* Swart, 20 Johns. Rep. 85. }

(G 3.) Upon what consideration.—What shall be a good one.

So, there ought to be a sufficient consideration, otherwise no use arises.

[*]And the consideration proper for raising an use by way of covenant, is for love and affection.

In consideration of his brotherly love. Pl. Com. 309. 2 Rol. 785. l. 20.

In consideration of marriage had or intended. Per Twisd. 1 Sid. 83. Pl. Com. 301. b. { Vide Den *ex dem.* Sasser *v.* Blyth, 1 Hayw. 259. Barrett *v.* French, 1 Conn. Rep. 354. Cheney's Les. *v.* Watkins, 1 Har. & Johns. 527. }

So, for advancement of his blood or kin, &c. Pl. Com. 309.

That the lands should continue in his name or blood. Pl. Com. 309. 2 Rol. 785. l. 50.

That they should descend to his heirs male, &c. Pl. Com. 309. b. 2 Rol. 785. l. 40. 7 Co. 13. b.

So, payment of debts, &c.

In consideration that he was bound for him in several recognizances. Semb. Cro. El. 394.

That he will enfeoff him of such land. Win. 59.

And it is sufficient, if a consideration appears by the import of the deed, though it be not expressed : as if a man covenants to stand seised to the use of his son, daughter, wife, brother, &c. 7 Co. 40. R. 1 And. 79.

To the use of his mother. R. 2 Jon. 105.

So, if a man, for love to his son, covenants to stand seised to the use of himself for life, and afterwards to his wife for life, and afterwards to his son, &c. an use arises to his wife (being named his wife) though another consideration is expressed. R. 2 Rol. 782. l. 40. 7 Co. 40.

So, if a consideration expressed for one extends to another, to whom by the covenant the estate is limited in the same deed, it is sufficient : as, if a man, in consideration of affection to his eldest son, covenants to stand seised to the use of him in tail, and afterwards to the use of his younger son, &c., an estate

arises to the younger son ; for the consideration expressed to the elder extends to the younger son. R. 2 Rol. 783. l. 5.

If, in consideration of affection to his brother he covenants to stand seised to the use of his brother and his wife for their lives ; this extends to the wife of his brother. 2 Rol. 783. l. 50. 786. l. 10.

So, in consideration that he will marry his daughter, a covenant to be seised to the use of both. 2 Rol. 784. l. 5. 15.

So, in consideration of affection to his son, extends to the wife of his son. 2 Rol. 784. l. 10. 2 Cro. 168.

So, if an estate be limited to several, upon a consideration which extends only to one, the use of the whole arises to him : as, if a man, in consideration of affection, covenants to stand seised to the use of B. his brother, D. and C. in trust, &c. though D. and C. are strangers, to whom the consideration does not extend, B. shall have the whole. R. 2 Rol. 783. l. 15. Vide post, (G 5.)

So, if some considerations expressed are good, and some not, it is sufficient : as, in consideration of 100l. and a rent to be granted ; though the consideration of the rent is executory, and therefore not good, the use arises upon the other consideration of 100l. R. Mo. 547, 8.

So, a grant in consideration of affection, and also of money, shall be good by way of covenant. R. 3 Lev. 192.

So, a consideration consistent with the deed, or with the considerations [*]expressed, may be averred. 2 Co. 76. 2 Rol. 786. l. 45. 790. l. 5. 7 Co. 40.

As, if in consideration of continuing the estate in his family, &c. a man covenants to stand seised to the use of B., it may be averred, that B. is of his kin. F. g. 301.

So, if the consideration expressed is not sufficient to raise an use, it may be averred to be made upon other considerations, which are good. 2 Rol. 790. l. 10.

[*Contra* if no consideration is mentioned in a deed, you may enter into proof of consideration ; but if any consideration is mentioned, and not said for other considerations, you cannot prove any other. 1 Vesey, 127.]

[But when the consideration expressed in the deed of conveyance was 28l., parol evidence was admitted to prove that 30l. was the real consideration. M. 30 Geo. 3. 3 T. R. 474.]

[And other considerations may be proved than those expressed in the deed. 7 Bro. P. C. 70.]

(G 4.) What not.—If it be too general, or does not import a real consideration.

But if the consideration be too general, it is not sufficient ; as, if a man, for divers good and valuable considerations, covenants to stand seised ; no use arises. 2 Rol. 786. l. 35. R. 1 Co. 176. a. Mo. 145. R. 2 Co. 15.

So, if the consideration mentioned does not import *quid pro quo* : as, in consideration of long acquaintance, or being school-fellows, &c. Pl. Com. 302. a. R. 2 Rol. 783. l. 35.

Or, being chamber-fellows, or entire friends. R. 2 Rol. 783. l. 30.

In consideration, that the king is the head of the commonwealth, hath the charge of preserving peace, repelling hostilities, &c. R. 2 Co. 15. Semb. 1 And. 141.

In consideration of love and affection to him who is not his kin.
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Or, to his bastard or natural son. Co. L. 123. a. R. 2. Rol. 785. l. 25. 30.

So, if it be, in consideration that A. out of the profits of the lands shall pay his debts; it is not sufficient to raise an use to A. for he gives nothing. R. Mo. 194. 1 Leo. 195.

Yet if a covenant be, in consideration of marriage, to A. and B. and the heirs of their bodies, &c. and afterwards there be a feoffment and fine to the same uses; though the marriage does not take effect, but B. (the woman) marries another, she shall take a moiety for life; for by the fine, &c. the uses are fixed in A. and B. R. Jon. 346. (Vide 2 Rol. 795. l. 5.)

(G 5.) If the covenantee be a stranger to the consideration.

So, if a man be a stranger to the consideration, no use arises to him; as, if a man, in consideration of marriage between his son and A. covenants to stand seised to the use of them for life, remainder to C., the remainder is void. Pl. Com. 307. b. 2 Rol. 784. l. 20.

If, for payment of debts, &c. he covenants to stand seised to the use [*] of himself for life, and afterwards to A. for years; the estate to A. is void, if he was not executor. R. 2 Rol. 784. l. 35. 1 Co. 154. a. 1 Leo. 195. 1 And. 260.

If, for advancement of his blood and marriage of his bastard, he covenants, &c. no use arises to the bastard; for she is *filia populi*, and a stranger. 2 Rol. 785. l. 25. 1 And. 79. Vide *Bastard*, (E.)

If, for advancement of his blood, name, and issue, he covenants to stand seised to his first, second, and other sons in tail, remainder to the king; the remainder to the king is void, for want of a consideration. R. Mo. 195. 2 Co. 15.

If, in consideration of the marriage of his son with A. without saying, for a settlement in his name or blood; no estate shall arise to himself, for the father is a stranger to this consideration, which was personal to the son. 1 Brownl. 193.

So, if in consideration of natural affection, a man covenants to stand seised to himself for life, with power to make leases, &c. a lease to a stranger is void, for he is not within the consideration, upon which the power was founded. R. 2 Rol. 260. l. 30. 2 Cro. 181.

So, if it be in consideration of marriage, with power to make leases, and the husband leases to a stranger; the lease is void as to the wife. R. 1 Lev. 30.

So, if one covenantee be a stranger, and the other not, the whole vests in the other; as, if A. for natural love, covenants with B. his brother, C. and D., to stand seised to the use of the covenantees and their heirs, in trust to raise portions for his issue: the whole use vests in B. his brother, to whom the consideration extends, not to the others. R. Jon. 419. 2 Rol. 783. l. 15.

Though the limitation was, upon trust to raise portions, the estate vests, which is not destroyed by the trust; but the estate shall be subject to the trust in equity. R. Jon. 419.

And if the trust becomes impossible by the act of God, the estate shall be absolute in the trustee. Ibid.

So, if in consideration of affection to his wife, a man covenants to be seised to him for life, afterwards to his wife for life, afterwards to such as his wife shall appoint; the consideration does not extend to a stranger to whom the wife shall appoint it. Semb. F. g. 300.

[If A. in consideration of love and affection to his wife, covenants to

stand seised to the use of them, and the survivor for life, remainder to their issue, remainder to such person as wife shall dispose to, and for want of such disposition to B., which B. is nephew to A., though not named as such in the deed, and the wife after A.'s death without issue conveys to D. D. has no title, as being a stranger, and B. has a title, as being named in the deed, he may aver himself within the consideration. P. 5 G. 2. Str. 934.]

So, if a man, in consideration of marriage and 100*l.* paid, covenants to stand seised to A., and B. his intended wife; no use arises, though the money be paid, if the marriage does not take effect: and the marriage was the principal, and the money only accessory to it. R. Mo. 102.

So, if the consideration be contingent or future, no use arises till it happens: as, if a man, in consideration of his marriage with B., covenants to stand seised to the use of himself and B., no use arises till the marriage takes effect. R. 2 Rol. 792. l. 50. Vide Uses, (K 7.)

[*]If a man, in consideration that A. will pay his debts, &c. covenants to stand seised to the use of A., &c. no use arises till the consideration be executed. R. Mo. 194.

But a contingent use shall arise by a covenant to stand seised, as well as by a feoffment. Per three J. Cro. El. 801.

So, if the consideration ceases, the use also ceases: as, if a man, in consideration of his marriage with B., covenants to stand seised to the use of him and B., and the marriage is solemnized before B. attains the age of twelve years, who after such age disagrees; the use ceases as to B. 2 Rol. 792. l. 52.

So, if after marriage they be divorced. 2 Rol. 792. l. 52.

[(H) MISCELLANEOUS COVENANTS.]

[*Covenant to pay rent.*—If a tenant covenants to pay rent during the term, without any exception in case of fire, he is bound to pay it, though the premises are burned down. An exception of casualties by fire, introduced into his covenant to repair, will not change the case, since the exception has no relation to the covenant to pay rent. 1 T. R. 318. Id. 312. Id. 170. 3 Anst. 687.]

[*To repair.*—It seems that no implied covenant to rebuild, in the part of the landlord, arises from the exception in the lessee's covenant to repair, of casualties by fire and tempest. 6 T. R. 488.]

[Under a general covenant to repair, a lessee is bound to rebuild premises accidentally destroyed, as by fire. 6 T. R. 650.] { Vide *Pasteur v. Jones*, Cam. & Nor. 194. }

[Under a general covenant to repair, a tenant is not bound to make repairs rendered necessary by the party wall act. 5 Taunt. 90.]

[If a lessee covenant to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repair, by giving six months notice in writing: these are two distinct and separate covenants, the former of which is not qualified by the latter. 1 Moore, 389.]

[Action against a tenant for breach of covenant in not repairing the demised premises. Plea, that the landlord did not assign him materials: bad, for he should have shewn that he asked. And so a plea that there were none proper to which he had a right, is bad; for this is putting the issue, not upon the fact, but upon the law. Loft. 43.]

[*To reside.*—A lease on condition that the tenant should actually occupy,
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is determined by his assignees taking possession on his bankruptcy. 8 East, 185.]

[*To pay taxes.*—A covenant by a tenant to pay all rates which during the term should be assessed upon the premises, except the land-tax, means, except the land-tax which the landlord is liable by law to pay; therefore the tenant must pay the additional tax occasioned by an improvement of the premises. 3 T. R. 377. Id. 379.]

[A covenant by a lessee “to pay, from time to time during the term, the land-tax, and all other taxes, rates, assessments, and impositions whatever, already laid, assessed, or imposed upon the premises,” does not make him liable for the expence of a party-wall built during the term, since the covenant has reference to taxes, which this is not. 3 T. R. 458.]

[A tenant covenants for payment of 80%. rent, all taxes thereon being to him allowed; and that he would pay all further or additional rates [*] on the premises or additions made by him. The landlord covenants to pay all rates on the premises, or on the tenant, in respect of the said yearly rent of 80%, except such further or additional taxes as may be assessed on the demised premises. Held, that the tenant must defray all increase of the old, as well as any new rates, beyond the proportion at which the premises were then rated. 16 East, 29.]

[*Increase of rent or a penalty.*—Under a reservation of an increase of rent during the last twenty years of the term, for every acre of meadow which during that period the tenant should plough up, and so in proportion for a less time than a year; the rent is payable if in any part of that period the tenant tills the land, though originally broken up before, and continues payable to the end of the term, though he lays it down again in grass. 3 Taunt. 469.]

[*Fixtures.*—A general covenant to yield up all erections and buildings made during the term, includes those erected for the purposes of trade, and let into the soil; *secus* if placed on pattens. 1 Taunt. 19.]

[*Assignment.*—A covenant not to assign, transfer, set over, or otherwise do, or part away the lease or premises, does not extend to an underlease. 2 Blk. 766. 3 Wils. 234.]

[Under a proviso that all assignments of a lease shall be void if not enrolled, under-leases are not included. Dougl. 56.]

[Under a proviso in a lease, that the tenant shall not set, let, or assign over the whole or any part of the premises, the word “over” is annexed to the word “assign;” so that an under-lease is in breach of the proviso. 2 T. R. 425.]

[Under a proviso in a lease, that the tenant and his executors shall not assign the premises, the executor is restrained. 2 T. R. 425.]

[Parting with exclusive possession of any portion of the demised premises, whether gratuitously or for rent, is within the proviso in a lease against letting to another. 1 M. & S. 297.]

[A general proviso in a lease against alienation, only extends to voluntary assignments; if provision is intended to be made against alienation compulsory by act of law, for example, under a commission of bankruptcy (which it may be), a particular proviso expressing such intention must be introduced. 3 M. & S. 353.]

[A. grants a lease to B., which contains a covenant that B., his executors or administrators, without mentioning assigns, should not underlet without the consent of the lessor. B. becomes bankrupt, and his assignees assign the premises to C. B. obtains his certificate, and C. re-assigns the

premises to him, after which he underlets them to another person. Held, that B. having been discharged at the time of his bankruptcy from all covenants in the lease by 49 G. 3. c. 121. s. 19., the under-letting by him, which was in the character of assignee, was no forfeiture. 1 Mars. 359. 5 Taunt. 795.]

[*Renewal.*—There is a covenant in a lease for sixty-one years that “at any time within one year after the expiration of twenty years of the said term of sixty one years, upon the request of the lessee, and his paying 6*l.* to the lessors, that they would execute another lease of the said premises under the lessee, for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years, &c. And so in like manner at the [*]end and expiration of every twenty years during the said term of sixty-one years, for the like consideration, and upon the like request, would execute another lease for the further term of twenty years, to commence at and from the expiration of the terms then last before granted,” &c. Under this covenant the lessee must apply within one year after the first twenty years; and if he wishes for a second renewal, then within a year after the second twenty years, since the intention appears to be, that there should always be forty years between the grant and commencement of the additional term. 1 T. R. 229.]

[*Valid or void.*—A covenant in a lease, which describes a thing as future, which was past at the time of the execution, is inoperative. 5 Taunt. 548.]

[Lease for twenty-one years, in consideration of 5*l.* 8*s.* for a fine, and a rent of 6*l.* 8*s.*, with a proviso of distress if the rent should be behind fourteen days. Covenant by the lessor at the end of eighteen years or before, at the request of the lessee, to grant a new lease for the like term of twenty-one years, at the like yearly rent, with all covenants, grants, and articles as in that indenture contained. The covenant is satisfied by granting a lease without the covenant for renewal. 3 Smith, 269. 7 East, 237.]

PLEADING CONCERNING COVENANTS, AND IN WRIT OF COVENANT. Vide PLEADER, (C 45, &c.—E 25, 26.—2 V 1, &c.—2 W 32.)

RELEASE OF COVENANTS. Vide RELEASE, (E 4.)

Vide also more of title COVENANT, in Chancery, (2 M 16.—2 X 1, &c.)

COVERTURE.

Vide ABATEMENT, (E 6.—F 2.—H 42.)—PLEADER, (2 W 21.)

COVIN.

(A) WHAT SHALL BE.

(B 1.) AN ACT BY COVIN IS VOID.

(B 2.) So, a fraudulent gift, &c. p. 295.

(B 3.) And a fraudulent feoffment, &c.—Vide supra, (B 2.) p. 299.

(B 4.) What shall not be fraudulent.—Vide supra, (B 2.) p. 301.

(A) COVIN, WHAT SHALL BE.

Covin is a secret contrivance between several to defraud and prejudice another. Co. L. 357. a. 9 Co. 110.

So, fraud may be committed by one only. 9 Co. 110. b.

[*](B 1.) AN ACT BY COVIN IS VOID.

The law abhors covin ; and, therefore every covinous act shall be void.

So, a lawful and rightful act, if it be done by covin, shall be void : as, if a wife, after the death of her husband, be of covin with B. to disseise the tenant, and endow her : the tenant shall avoid the dower. Co. L. 357. b.

If tenant for life makes a surrender of his estate, to defraud his creditors, it shall be void. Vide Hale in 1 Vent. 257.

(B 2.) So, a fraudulent gift, &c.

By the st. 50 Ed. 3. 6. because divers give their chattels by collusion, and then flee to places privileged, till their creditors compound, it was enacted, that if such gift be found to be made by collusion, the creditor shall have execution of the chattels, as if no gift had been made.

And by the st. 3 H. 7. 4. deeds of gift of goods and chattels to defraud creditors, made on trust, &c. shall be void.

So, by the st. 13 El. 5. every gift, grant, bargain, &c. of goods and chattels, or any profit out of them, and every bond, judgment, and execution made of intent to defraud creditors or others of their just actions, debts, damages, forfeitures, heriots, mortuaries, &c. shall be void against the person so defrauded, his heirs, executors, or administrators, &c.

And, if any party or privy to such fraudulent gift, grant, &c. put in ure, or avow, &c. the same as true, and done *bona fide*, and on good consideration, he shall forfeit the whole value of such goods, bond, &c. a moiety to the queen, a moiety to the party aggrieved.

Provided, not to avoid any interest in goods, chattels, &c. conveyed, &c. on good consideration and *bona fide* to any person, not having at the time of such conveyance notice of such covin.

A fraudulent gift, or grant of goods and chattels, was void by the common law. Dy. 295. a.

And, therefore, if it was made after judgment to defraud the execution, it was not a trespass in the officer, or creditor, who took them in execution. Dy. 295. a.

Yet, a fraudulent deed was not void by the common law against him, who had a younger title. R. 3 Co. 83. a.

But now, without question, every gift, grant, &c. being fraudulent, shall be void as to creditors, &c. whether they claim by a younger, or by an elder title.

As, if a man, being in debt, conveys his goods to another, and takes the profits. Dy. 295.

If a man before his death bargains and sells all his horses to another, without a consideration, to defraud the lord of his heriot. Dy. 351. b.

If a man, indicted for recusancy, conveys his leases and goods to others, upon feigned considerations, to defeat the king of his forfeiture, and then flies over sea. R. 3 Co. 82. a.

And the word, forfeiture, in st. 13 El. 5. shall be extended to every thing which may be forfeited to the king, or to a subject. R. 3 Co. 82. b.

[*]If A. makes a feoffment to avoid a formedon, &c. against him, and then pleads non-tenure. R. Cro. El. 233.

And a deed has the ensigns and marks of fraud, if it be comprised in general terms : as, if he grants all his goods and chattels generally without exception. R. 3 Co. 81. a.

If it be made in a secret and clandestine manner. R. 3 Co. 81. a. 6 Co. 72. a.

If it be pending an action, indictment, &c. 3 Co. 81. a.

If it be accompanied with unusual clauses : as, if the deed expresses, that it was made honestly and *bona fide*, &c. Ibid.

Or, has the colour of payment of debts : when none were paid, and the possession continues with the bargainor. 6 Co. 72. a.

So, if it be upon an express trust. 3 Co. 81. b.

Or, if a trust be implied : as, if after the gift, bargain, &c. the vendor continues in possession, and takes the profits, &c. 3 Co. 81. a.

If the grant be without any consideration. 3 Co. 81. b.

If the grant be for affection, or in consideration of blood, or nature. Ibid.

Or, to a son, cousin, or other relation. Ibid.

If a bargain, &c. of goods be attended with marks of fraud, it shall be void, though it was made upon good and valuable consideration : as, if A. conveys all his goods and chattels to a real creditor for satisfaction of his debt, and afterwards continues in possession, &c. R. 3 Co. 80. b. [2 T. R. 587.]

[So, the purchase of a debtor's goods, with the knowledge of a sequestration by chancery, or of a judgment and execution, though for a valuable consideration, is void. Cowp. 434.]

[If the vendee continue in possession, and appear as the visible owner, this is evidence of fraud. Ibid.]

[So, is the circumstance of a man's being indebted at the time of his making a voluntary conveyance. Ibid.]

[But these are not conclusive ; the question may still remain, whether the conveyance was *bona fide*? Cowp. 432.]

So, if A. indebted to several persons, conveys all his goods to one in satisfaction of his debt, upon agreement, that he will deal favourably with him ; for though it be a good consideration, it is not *bona fide*. R. 3 Co. 81. a.

If a man be party or privy to a fraudulent grant, &c. an information lies against him upon the st. 13 El. 5. 3 Co. 30. b.

Or, an action of debt for so much as is the value of the goods, by *qui tam*, &c. Dy. 351. b.

And, if to defraud of an heriot, &c. a fraudulent deed be made of twenty horses ; an action lies for so much as was the value of all the horses contained in the grant. Per two J. Manw. cont. Dy. 351. b.

If a fraudulent gift, grant, &c. be made, it shall be absolutely void as to creditors.

But it is not void as to the party, his executor, or administrator : and therefore, the administrator, to covenant for delivery of goods sold by fraud to B. and covenanted to be delivered at the death of the covenantor, cannot plead the st. 13 El. 5. and that the sale was to defraud creditors. R. Yel. 196, 7. 2 Cro. 271.

[*]But a gift, bargain, &c. shall not be fraudulent, if it be made *bona fide* and upon valuable consideration. Vide post, (B 4.)

[That the penalty of the st. 13 Eliz. c. 5. against fraudulent gifts, &c. may be incurred, it is necessary that the creditor be actually defrauded of

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payment of his debt, which he cannot be said to have been, where, having a lien upon the property, as under a distress or otherwise, he voluntarily relinquishes it to the defendant, insisting on his (fraudulent) claim. 4 East, 1.]

[That a judgment, &c. may be avoided, and a penalty incurred under st. 13 Eliz. c. 5. not alone must the creditor have been prevented satisfying his demand; the judgment, &c. must have been obtained originally from the motive of preventing him, and semble, from that alone. 4 East, 1.]

[Semble, that the st. 13 Eliz. c. 5. extends to the making penal not only the giving of bonds, but likewise of all the other securities therein mentioned, under the circumstances therein described. 4 East, 1.]

[Semble, that a fraudulent assignment within the meaning of the st. 13 Eliz. c. 5. is, what in reality is none at all; a mere formal transfer executed, not to give the alienee the property, but only to induce a belief that it is vested in him; that he may hold it in trust for the debtor. 3 M. & S. 375. In all cases, however, the question of fraud must be decided by reference to the motives of the party making the deed or assignment. 8 T. R. 521. A secret transfer is always a badge of fraud. Lofft. 782.]

[A debtor, unless prohibited by the bankrupt laws, may, from whatever motive (see, however, 5 T. R. 420, where the rule has this limitation, "unless he exhausts his whole estate;" but the spirit of the decisions is against this limitation), prefer by assignment or payment, one creditor or particular creditors, if he does so in payment of his or their just demands, and not as a mere cloak to secure the property to himself. 5 T. R. 235, 420.]

[And what he may do directly, may be done through the intervention of a trustee. 8 T. R. 521.]

[The pendency of another creditor's suit is immaterial; and since the motive is so likewise, (vide supra, B. 1.) the transaction is valid, though done to defeat that creditor's claim. 3 M. & S. 375.]

[A conveyance of land by a trader, in trust to sell and pay an urgent creditor, with a further trust to pay debts to relatives not passing in contemplation of bankruptcy, though an act of bankruptcy is valid, at least so far as concerns the creditor. 3 Taunt. 231.]

[An assignment by a debtor of his whole estate in trust for all his creditors, in certain proportions, is valid. 5 T. R. 530.]

[That an assignment by joint traders of all their effects may be valid; the concurrence of all their creditors, as well separate as joint, is requisite; since, though all the joint creditors concur, yet if any separate creditor of one refuse, the assignment is void, quoad that one share, and if by deed is, as to him, an act of bankruptcy. 8 T. R. 140.]

[A debtor is sued by his creditor, and pending the suit, executes an assignment of his effects to trustees, for the benefit of all his creditors, who take possession. Held, that he was entitled so to do, although the fact of the assignment was unknown to, and therefore unacquiesced in by any of the creditors at the time. The act itself being laudable, [*]that determined its nature: and the motive was immaterial. 3 M. & S. 371.]

[An assignment (3 M. & S. 371.) or a warrant of attorney to confess a judgment given to a trustee for an equal distribution of the party's estate amongst all his creditors, is valid, if *bona fide*, though the demand of a particular creditor who is suing him may be thereby defeated, except for a proportionable part. 4 East, 1.]

[Replication to a plea in bar to an extent in aid, that defendant was trustee under a prior deed of assignment for the general benefit of all the in-

solvent's creditors; that the prosecutor of the extent was indebted to the crown before and at the time of executing the deed; that the insolvent then carried on trade, and was not then seised of lands, &c.: that the insolvent was then indebted to the prosecutor, and that the prosecutor had not executed the assignment; held bad on general demurrer. 3 Price, 6. Such assignment is not fraudulent against such a creditor, unless there has been a commission of bankrupt sued out. Ibid. Nor can such a deed be avoided by the effect of an extent; as it may by a commission of bankrupt. 3 Price, 6.]

[Permitting the former proprietor to continue in possession, does not avoid a sale of goods made *bona fide*, and in the common course of dealing. 2 B. & P. 59. 4 Taunt. 823; at least where the sale is notorious to the neighbourhood, and the permission is given to accommodate the vendor. 1 M. & S. 251. 4 M. & S. 248.]

[If after a sale of personal property for valuable consideration, the vendor remain in possession, and such possession be inconsistent with the terms of the contract of sale, the sale is void as to creditors; as, where the sale is absolute. *Secus* where the possession is consistent with the contract. 5 T. R. 420. 7 T. R. 67. As where the sale is conditional, and possession is not to be taken until after a time, or the happening of an event; if the sale is by writing, any verbal agreement collateral thereto, that possession shall not be taken immediately, is of no avail, since by law it forms no part of the contract. 2 T. R. 587.]

[A bill of sale, though unaccompanied with possession is valid against a creditor who was privy and assenting thereto. 1 Taunt. 381.]

[Where on a sale of property possession is taken, so far as the nature of the subject matter, the circumstances of the case, and the relative situation of the parties admit, the sale is neither fraudulent quoad creditors, nor will the property pass under the vendor's bankruptcy. 7 T. R. 67.]

[A., a farmer, executes a bill of sale on the 26th of September of all his property absolutely to B., for a debt of 600*l*. B. puts his son in possession, A. continuing to reside on the premises, and to conduct the farm. On the 30th November the sheriff takes the stock, corn, &c. in execution, at the suit of C. against A.; after satisfying the execution, enough remains to cover the 600*l*. due to B. Held, that the jury, allowing for the fluctuation of the market, were warranted in finding that the goods, at the time of executing the bill of sale, were not worth more than the 600*l*.; and therefore that the bill of sale was made *bona fide*, and that A. was entitled to recover to the amount of 600*l*. in an action of trover against the sheriff. 2 Mars. 427. 7 Taunt. 149.]

[The property and goods of A. being in possession of the sheriff, under a writ of *si. fa.*; he executed a deed of assignment to B. for a valuable [*]consideration, on which the execution was withdrawn. B. superintended the management of the property, but allowed A. to continue in possession. The same property was seised under a subsequent execution at the suit of C. Held, that such property was protected by the assignment to B., although A. had continued in the visible possession. 1 Moore, 189.]

[A. being indebted by settlement before marriage, in consideration of the marriage and of 10,000*l*. his wife's portion, which was supposed to be more than the amount of his debts at that time, conveys all his real estate, and likewise his household goods (his real estate alone not being thought an adequate settlement), in trust for himself for life, remainder to his wife for life, remainder to his first and other sons, in strict settlement. The lady

being a ward of chancery, the settlement was approved of by the master, and the goods enumerated in a schedule. A. after the marriage continued in possession of the goods; after which a creditor, at the time of the settlement, having obtained judgment, took them in execution. Held, that the settlement was good against creditors; but had A. let the house ready furnished, the creditor during A.'s life would have been entitled to a portion of the rent. Cowp. 432.]

[There is a deed of separation between husband and wife, whereby the husband conveys to trustees all his debts and effects, the greater portion of which were brought to him by the wife in consideration of the sum of 200*l.* (which bore but a small proportion to their value), to be paid to him by one of the trustees, in trust to sell, reimburse the trustee the sum advanced, pay the husband's debts, which the trustees should consider justly due, and hold the residue for the wife. Held, that the motives of the transaction being *bona fide*, the assignment was valid against creditors. 8 T. R. 521.]

[A. deposits goods with B. for sale, and then assigns his property to trustees for his creditors; the trustees, at B.'s request, pay the duties on the goods, which when sold do not produce sufficient to produce them. Held, that the trustees are entitled to recover the money advanced by them, together with the proceeds of the goods, though A. had, before the assignment, agreed that they should go in liquidation of a claim which B. had upon him. 1 Mars. 130. 5 Taunt. 446.]

[The several trust deeds of the opera-house and goods therein held fraudulent and void, as against creditors taking the goods in execution. 5 Taunt. 212.]

(B 3.) And a fraudulent feoffment, &c.—Vide supra, (B 2.)

So, by the st. 50 Ed. 3. *quod vide ante*, (B 2.) a feoffment found to be by collusion to avoid execution, shall be void.

And by the st. 13 El. 5. every feoffment, grant, conveyance, &c. of lands or tenements, or any profit or charge out of them, as of rent, common, &c. made to defraud creditors, or others, of their just actions, suits, debts, damages, penalties, forfeitures, heriots, mortuaries, reliefs, shall be void as to all persons who might so be defrauded, their heirs, successors, executors, administrators, or assigns.

So, by the st. 27 El. 4. every conveyance, grant, charge, estate, incumbrance, or limitation of use, or out of lands or tenements, made to defraud any who hath or shall purchase in fee for lives, or years, the same lands, or any part of them, or any rent, &c. out of them, shall as [*]to such purchaser for money or other good consideration, and all claiming by, from, or under him, be void.

And every conveyance, &c. with any clause of revocation, &c. shall be void as to any, who shall after purchase for money or other good consideration, (the first conveyance not revoked), and all claiming by, from, or under them.

And any party or privy to such fraudulent conveyance, who puts the same in ure, as true and made *bona fide* or on good consideration, to the prejudice of such purchaser, shall forfeit one year's value of such lands; a moiety to the queen, a moiety to the party grieved.

Provided not to extend to any conveyance, charge, &c. made on good consideration, and *bona fide*.

And therefore, every feoffment, &c. made to defraud creditors, &c. shall be void. Vide Fraudulent Gift, &c. ante, (B 2.)

So, every conveyance, &c. to defraud a purchaser, is void as to him, &c.
—Who shall be a purchaser, vide in Chancery, (4 l 2.)

So, if tenant for life commits a forfeiture, to the intent that the reversioner shall enter; a purchaser shall avoid it, as well as a conveyance. Per Hale, 1 Vent. 257.

Every voluntary conveyance *prima facie* shall be fraudulent as to a purchaser. Adm. 1 Sid. 133. 1 Vent. 194. R. Ca. Ch. 100. 217. Per Hale, 2 Lev. 147.

Though it be for advancement of his blood, for natural affection, &c.

Though it be in consideration of a marriage had, where there was no precedent agreement for it. Ca. Ch. 99. Vide infra. Vide post, (B 4.)

So, a secret lease, &c. shall be fraudulent. 6 Co. 72.

So, a conveyance upon colour of a good consideration, is fraudulent, where it is only colourable: as, if a man assigns a lease to an infant for payment of debts, which are not paid. R. 6 Co. 72.

If he conveys to his daughter, &c. for her provision in marriage, and she does not marry. R. 1 Sid. 133.

Or, conveys to trustees to the use of himself for life, with power to make a mortgage, and then in trust to sell for payment of his debts. R. 2 Ver. 510.

If tenant in tail conveys to trustees by fine upon trust to pay debts, with power to make leases with rent or without rent, for any time, and afterwards continues in possession; for the power of leasing, and the continuance in possession, are marks of fraud. R. 2 Lev. 147.

So, if there was an agreement before marriage to make a settlement, and he after marriage makes a settlement for other purposes. R. 2 Lev. 147.

If the agreement was only for a jointure to the wife, and the settlement goes to the issue of the marriage, it will be fraudulent for so much. 1 Ver. 285, 6.

If the agreement was upon the marriage of B. his son, and after a limitation to B. for life, he limits in remainder to another son; the remainder will be fraudulent as to a purchaser. R. Lane, 22.

[But if A. seised in fee has a mother who has annuity issuing out of the whole lands, and two brothers B. and C., and the mother previous to A.'s marriage consents to part with her security on the whole lands, and to take it on part of the lands, and A. and mother join in fine, and [*]then in consideration of said grant and release, and of marriage and portion, conveys to trustees to pay annuity out of part, then the whole lands to the use of A. for life, remainder to preserve, &c. remainder to first and other sons, remainder to B. and C. successively in tail-male, remainder to the daughters of A., remainder to A. in fee; the mother's consent to change her security is a good consideration for A. to make this settlement on B. and C. M. 8 G. 3. 2 Wils. 356.]

So, a conveyance with a clause of revocation will be fraudulent as to a purchaser, though the power of revocation be future, viz. after the death of B., &c. and the statute speaks only of a present power. R. 3 Co. 82. b. Mo. 618. Bridg. 23.

So, if the power of revocation is to be exercised with the assent of another. 3 Co. 82. b. Bridg. 23.

Or, to be executed by another.

So, if the power be reserved by the recoverer, and not by him to whose use the recovery was. R. Mo. 616.

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So, a conveyance, with a power of revocation, will be fraudulent, though made in consideration of marriage, &c. Lane, 22.

So, it will be void as to the conusee of a statute, or any who has a charge out of or upon the land, as well as to a purchaser, or grantee, &c. of the land itself. R. Bridg. 22.

So, if a conveyance be with a clause of revocation, and afterwards the power be extinguished by fine, feoffment, &c. to the intent to defraud a purchaser; the fine, feoffment, &c. shall be void as to him, for a conveyance with a power of revocation is in the same degree as a conveyance by fraud. R. 3 Co. 83. a. Mo. 618.

If a father makes a fraudulent lease, &c. and the son sells the estate, the purchaser shall avoid it. R. 6 Co. 72. b.

Though the son did not know of the fraudulent conveyance. 6 Co. 72. b. A fraudulent conveyance shall be void as to a purchaser, though he had notice of it before his purchase. R. 5 Co. 60. b. D. 2 Lev. 105.

(B 4.) What shall not be fraudulent.—Vide supra, (B 2.)

But a conveyance shall not be fraudulent, if it be made upon good consideration, though it was concealed or secretly made. R. 2 Cro. 158. 455. R. 1 Vent. 194.

So, if it was concealed in the time of the civil war, for fear of a sequestration. R. 1 Sid. 134.

So, a lease made by him who has a power of revocation shall not be fraudulent, though there be no consideration, except the rent reserved. R. 2 Cro. 181.

So, a conveyance upon a good consideration is not fraudulent, though it was not for money: as, if it be upon consideration of a marriage to be had. [Vide Cowp. 705. 708.]

So, if it be made after marriage, in pursuance of articles, &c. before marriage. R. 2 Cro. 158. 455. R. 1 Vent. 194. Vide ante, (B 3.)

Or, in pursuance of an agreement by parol before marriage. 2 Cro. 158. 455. 2 Vent. 194.

Though it be provided that it shall be void upon settlement of another jointure on his wife, and so in some sort is determinable at his pleasure. R. 2 Cro. 455.

[*]Or, if it be with a clause of revocation, with the consent of four trustees for the wife; for the settlement being upon good consideration, and not determinable at his pleasure, or of any in trust for him, is good. R. 2 Jon. 94.

So, if husband and wife join in the alienation of land, limited to them and the heirs of their bodies by marriage settlement, and the same day the husband settles lands of greater value to the same uses; the second settlement is not fraudulent as to a purchaser of the same land, though it does not appear to be pursuant to the marriage agreement; for it shall be intended the wife would not otherwise have joined in the alienation of her jointure. R. 2 Lev. 71.

So, if the husband, upon such alienation, undertakes to give to the wife at his death 400*l.* and afterwards gives an obligation to such intent. R. 2 Lev. 148.

So, a settlement upon marriage, with a proviso to charge land with 2,000*l.* is not void as to a purchaser, though it was voluntary as to such proviso. R. 1 Lev. 151.

So, if a conveyance, in its commencement voluntary or covinous, becomes

afterwards settled upon a good consideration, it shall not be avoided as fraudulent by a subsequent purchaser: as, if a man conveys to his daughter, as a provision for her when she shall marry, and upon prospect of this settlement she marries, and then the father sells for a valuable consideration; the purchaser shall not avoid the settlement upon the daughter. R. 1 Sid. 133, 4.

So, if a man makes a covinous settlement upon his son, who sells for a valuable consideration, and afterwards the father sells to another for money, his purchaser shall not avoid the settlement by the son. R. 1 Sid. 134.

So, if a voluntary lease be assigned for a valuable consideration, the purchaser of the inheritance after the assignment shall not avoid it. R. 3 Lev. 388. Skin. 423.

So, a voluntary settlement by a father, shall not be avoided by a purchaser from the son. 1 Ver. 46.

So, if the consideration extends only to an estate-tail; a remainder afterwards, though without good consideration, is not fraudulent; for a remainder after an estate which may be perpetual, shall not be supposed made for defrauding creditors. R. 2 Lev. 105.

So, a settlement after marriage, in consideration of the wife's joining in the alienation of her jointure, shall not be fraudulent as to the issue, though the husband might have barred them without his wife. R. 2 Lev. 71.

So, a voluntary conveyance shall not be taken to be fraudulent, as to a purchaser upon a consideration of nature, or blood, &c. for the words in the st. 27 El. for money or other good consideration, are tantamount to the words, or other valuable consideration. R. 3 Co. 83.

And therefore, if a man for advancement of his heirs male to be begotten upon the body of his wife, covenants to levy a fine to the use of himself for life, and afterwards to his eldest issue male upon the body, &c. and afterwards, to defeat that covenant, makes a fraudulent lease, and then levies the fine; though the eldest issue be a purchaser *bona fide*, he shall not avoid the lease. R. 3 Co. 83. b. Cro. El. 444.

[*]Or, covenants to stand seised to the use of his son, nephew, &c. R. Mo. 602.

So, if a man makes a settlement after marriage upon his wife for her jointure, without a precedent agreement, the wife shall not avoid a fraudulent conveyance made before. R. Cro. El. 445.

So, if a lease be made *bona fide*, but without a fine given, or rent reserved, the lessee shall not avoid a fraudulent conveyance made before. R. 3 Co. 83. a.

So, if a man, by imposition of the vendee, sells to him at an undervalue, he shall not avoid a voluntary settlement made by the vendor before by advice of friends: for the statute does not extend to a purchaser by indirect means. 3 Co. 83. b. Cro. El. 445.

So, if a purchaser upon consideration of nature or blood, afterwards sells upon a valuable consideration, the vendee shall not avoid a voluntary settlement made prior to the settlement on his vendor. R. Mo. 602. R. Ray. 25.

Vide FRAUD, in title CHANCERY, (3 F 1, 2.—3 M 1, &c.—3 N 1.—4 D 3.—4 H 4.—4 L 1.—4 O 2.)

COUNCIL.

KING'S COUNCIL. Vide Roy, (E 1, &c.)

PRESIDENT OF THE COUNCIL. Vide Roy, (E 2.)

PRIVY COUNCIL. Vide Roy, (E 2, &c.)—**PARLIAMENT,** (L 30.)

COMMON COUNCIL. Vide FRANCHISES, (F 25.)—**LONDON,** (F).

COUNT.

Vide **ABATEMENT**, (G 1, &c.)—**ACCOMPT**, (E 2.)—**ACTION UPON THE CASE**, (C 2.)—**ACTION UPON THE CASE UPON ASSUMPSIT**, (H 2, &c.)—**ACTION UPON THE CASE FOR A CONSPIRACY**, (C 2, &c.)—**ACTION UPON THE CASE FOR A DECEIPT**, (F 2, 3.)—**ACTION UPON THE CASE FOR DÉFAMATION**, (G 1, &c.)—**ACTION UPON THE CASE FOR A DISTURBANCE**, (B 1.)—**ACTION UPON THE CASE FOR NEGLIGENCE**, (B 1.—C 2.—**ACTION UPON THE CASE FOR A NUSANCE**, (E 1.)—**ACTION UPON THE CASE UPON TROVER**, (G 1, &c.)—**AMENDMENT**, (L 1, 2.)—**ANNUITY**, (E).—**APPEAL**, (G 6.)—**ATTORNEY**, (B 21.)—**AUDITA QUERELA**, (E 6.)—**CHARTERS**, (B 2.)—**COURTS**, (P 9.)—**DROIT**, (C 4.)—**PLEADER**, (C 1, &c.)—(F 6, 7. 12.—M 1.—S 24. 43.—Y 3.—2 L 1.—2 S 16.—2 V 2.—2 W 7, &c.)—(2 X 2.—2 Y 2.—2 Z 1.—3 A 5.—3 E 2.—3 F 2.—3 I 3.—3 K 10.—3 M 3.—3 N 3.—3 O 2.—and other places in the same title.—**PROHIBITION** (I.)—**QUARE IMPEDIT**, (B 2.)—**VOUCHER**, (E).

[*]COUNTERFEITING.

Vide **FORGERY**.

COUNTERFEITING THE GREAT OR PRIVY SEAL. Vide **JUSTICES**, (K 6.)

———— **MONEY.** Vide **JUSTICES**, (K 7.)

COUNTERMAND.

COUNTERMAND OF A WILL. Vide **DEVISE**, (F 1, 2.)

———— **OF AN AUTHORITY.** Vide **ATTORNEY**, (B 9, &c.—C 8, &c.)

COUNTERPLEA.

Vide **VOUCHER**, (B 1, 2.)

COUNTY.

(A) **COUNTY.**

(B) **SHERIFF.**

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(C) COUNTY COURT.

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[(D) RATE. p. 311.]

[*] (A) COUNTY.

The kingdom was divided into counties before the time of king Alfred. Co. E. 168. a. 2 Inst. 71.

But others aver, that the division of the kingdom into counties, and of the county into hundreds, and of the hundred into tithings, was originally made by king Alfred.

The county, by the Saxons, was called the shire, from *schiram, partiri*. Co. L. 168. a.

The king by his patent may make a county, or erect any part of a county into a county by itself. Poph. 17.

So, in the erection of a town into a county he may reserve a privilege, &c. which the county out of which it is taken had there before: as, to hold courts, assizes, gaol-delivery there. R. Poph. 17. 1 And. 292.

The courts of Westminster judicially take notice of every county. 2 Sal. 266.

As to county palatine, vide Franchises, (D 1, &c.)—Abatement, (D 2.)

As to Wales, vide Wales, (A 3.)

(B) SHERIFF.

(B 1.) How constituted.

The earl had antiently the government of the county. Co. L. 168. a. Dav. 60. a.

And now the sheriff is the principal officer there under the king. Co. L. 168. a.

Who was an officer before the Conquest. 3 Co. Pref. 2. b.

Antiently the sheriff was chosen, as the coroner is, by the county. 2 Inst. 174. 558, By Art. sup. Chart. 28 Ed. 1. 8.

By the st. of Linc. 9 Ed. 2. sheriffs shall be assigned by the chancellor,

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treasurer, barons of the exchequer, and justices ; or, in the absence of the chancellor, by the treasurer, barons, and justices.

By the st. 14 Ed. 3. 7. by the chancellor, treasurer, chief baron, and two chief justices yearly, the morrow after All Souls, at the exchequer. (Vide st. 12 R. 2. 2.)

And the king ought regularly to name one of the three persons presented to him according to the statute. Certified by the two chief justices, with the agreement of the other justices. 34 H. 6. 2 Inst. 559.

But it is not of necessity that the king appoint one of the three presented to him. Semb. 2 Inst. 559.

So, the day for nominating sheriffs may be adjourned by the king to a time after the morrow of All Souls. Cro. Car. 13. R. Cro. Car. 595.

So, the king may appoint without such assembly. R. Dy. 215. b.

The king by letters patent constitutes him whom he will have to be sheriff. Crompt. Off. of Sheriff, 183.

And other letters patent are directed to all archbishops, bishops, dukes, earls, barons, knights, and others within the county, to be aiding and attending upon the sheriff. Ibid.

But by the st. 3 G. 1. 15. if a sheriff die before his year ends, or be superseded, his under-sheriff shall continue in his office, and execute the same in all things in the name of the sheriff deceased, and shall be answerable for the same in all respects, &c.

[*](B 2.) For what time.

Antiently, a sheriff might be constituted for life, for years, or in fee.

But by the st. 14 Ed. 3. 7. 28 Ed. 3. 7. 42 Ed. 3. 9. no sheriff shall continue in his office above one year.

And by the st. 23 H. 6. 8. (which confirms the former statutes), if any sheriff, under-sheriff, &c. occupy his office contrary to the effect of the said statutes (except under-sheriffs and other officers in London, and sheriffs in counties that have an estate of inheritance or freehold in their office), he shall forfeit 200*l.* yearly, as long as he so occupies ; and a pardon of such offence or forfeiture shall be void.

And all patents of the said office for years, for life, in fee, or tail, shall be void.

And therefore, the commission to the sheriff says, *commisimus A. com. nostr., &c. custodiend. quamdiu nobis placuerit.* Crompt. Off. of Sheriff.

Yet by the st. 12 Ed. 4. 1. & 17 Ed. 4. 6. a sheriff may execute and return writs, and do any thing belonging to his office, during Michaelmas and Hilary terms, unless he be duly discharged, without incurring the penalty of the said st. 23 H. 6. 8.

(B 3.) How discharged.

After a new sheriff is appointed, a writ shall be directed to the old sheriff, commanding him *quod comitat. una cum rotulis, brevibus, memorandis, & omnibus, aliis ad officium vic. com. præd. spectan. per indentur. int. te & præfat. W. conficiend. liberet.* Crompt. Off. of Sheriff, 183. b. Dy. 355. a.

And after such writ delivered to the old sheriff, his authority ceases.

So, if it be delivered to the under-sheriff in the county-court. Per two J. Dy. 355. a. Dub. Crompt. Off. of Sheriff, 183. b.

And if the under-sheriff, after the delivery of the discharge to his sheriff, does execution, though he did not know it, it shall be void. Per two J. Dy. 355. a. in marg.

After the writ to the sheriff for his discharge, he ought to deliver to the new sheriff, by indenture with a schedule, all writs and rolls in his custody, and all prisoners by their names, and the causes for which they were committed to him. Crompt. Off. of Sher. 183. b.

[Assignment of prisoners by under-sheriff to the succeeding high-sheriff is good without indenture. Barnes, 367.]

And if he does not mention any execution in the schedule, or give notice of it to the new sheriff by parol, when he delivers a prisoner to him for another cause, and the prisoner afterwards escapes; an action lies for the escape against the old sheriff. R. Mo. 688, 9. 2 Leo. 54.

So, a writ of supersedeas, though it be not returnable. R. 1 Mod. 222. 2 Mod. 217.

And an action upon the case lies against him, if he does not deliver it. R. 1 Mod. 222.

But an execution by the sheriff before notice of his discharge, though a new sheriff be appointed, shall be lawful. R. Dy. 355. a. in marg. R. Cro. El. 440. R. Mo. 364. 186.

So, the holding of a county court. Cro. El. 12.

[*]So, if a barony, or other dignity, descends to the sheriff, he is not discharged; but he continues sheriff during the will of the king. R. Cro. El. 12.

Though the dignity descends in the time of parliament, so that he ought to attend parliament as a peer. Cro. El. 12.

As to the oath, duty, and office of a sheriff, vide Viscount.

(C) COUNTY COURT.

(C 1.) The Style, &c. The Sheriff's Court.

The sheriff has two courts within his county; the tourn, formerly the folk-mote, for criminal causes, (*de quo* vide Leet, (A);) and the sciremote, or county court. 2 Inst. 69. Dav. 60. a.

The style of the county court is, *Essex ss. curia prima comit.* A. B. vic. com. præd. tent. apud D, &c. 4 Inst. 266.

And therefore, the county court is the court of the sheriff. R. 4 Co. 33.

A writ of justices, &c. is directed to the sheriff; for it is his court. 6 Co. 11. b.

And therefore, the sheriff alone may name the county clerk; for it is incident to his office. R. 4 Co. 33.

And if the king by patent constitutes a county clerk before the sheriff himself has his patent; yet the grant of the king shall be void. R. 4 Co. 33. Mitton.

(C 2.) Who shall be judge there.

The county court is a court-baron and not a court of record, in which the suitors are judges, and not the sheriff. R. 6 Co. 11. b. Per Coke and Litt. Catesby cont. 6 Ed. 4. 3. b.

Though the plea be there by justices, &c. 6 Co. 11. b.

Or, in admeasurement of dower, replevin, &c. Per Litt. 7 Ed. 4. 23. a.

In these cases, the sheriff or his bailiffs are only ministers. 6 Ed. 4. 3. b.

And therefore, upon a judgment in the county court, a writ of false judgment lies, and not error. 6 Co. 11. b.

Though the judgment be given there upon a justices. R. 2 Leo. 34. 210. 21. H. 6. 34.

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But in re-disseisin the sheriff is judge, and the proceedings are of record, upon which error lies. 6 Co. 11. b. Vide Assise, (F 1, &c.)

So, if a plea be there by justices, the sheriff ought to be there in person, and cannot make a deputy : for if he does, the proceedings will be *coram non judice*, and void. R. 2 Leo. 34. 210.

Yet if the court is alleged to be held before the sheriff, it seems to be well. 21 H. 6. 34.

So, in the tourn the sheriff is judge. 6 Co. 12. a.

(C 3.) When it shall be held.

By st. M. Ch. 9 H. 3. 35. *nullus comitat. teneatur nisi de mense in mensem, & ubi major terminus esse solebat, major fiet* : which was an affirmance of the common law. 2 Inst. 70.

[*]And by the st. 2 & 3 Ed. 6. 25. no county court shall be deferred longer than from month to month, and so be kept every month.

And the computation shall be by lunar months. 2 Inst. 71. Vide Ann (B.)

[All county courts held for the county of York, or any other county courts that used to be held on Monday, shall be called and begun on Wednesday, and not otherwise. 7 & 8 W. 3. c. 25. s. 9.]

(C 4.) At what place.

A county court may be held at any place within the county, if it be not appointed by statute in a place certain.

[The county court for Sussex shall be kept alternately at Chichester and Lewes. 19 H. 7. c. 24.]

[The county court of Northumberland shall be kept only in the town or castle of Alnwick. 2 & 3 Ed. 6. c. 25. s. 3.]

(C 5.) The jurisdiction of the county court.—By justices.

The county court may hold plea by justices of any value above 40s., for it is in the nature of a commission. 2 Inst. 312. 4 Inst. 266.

Though the value be 1000*l*. 21 H. 6. 34.

As in debt, detinue, trespass, and other personal actions. 4 Inst. 266. F. N. B. 85. F.

Though the trespass be *vi et armis*. 2 Inst. 312.

In annuity. 4 Inst. 266.

Dower, *unde nihil habet*, and *quarentina habend*.

So, in divers real actions the sheriff may hold plea by justices ; as, in admeasurement of dower, or pasture. 4 Inst. 266. 2 Inst. 312.

In a writ of mense of customs and services. 4 Inst. 266.

In a *quod permittat*, nuisance, &c. 4 Inst. 266. Vide *Quod permittat*, (D 1.)

In *rationab. divisio*, and *curia claudenda*. 4 Inst. 266.

In *secta ad molendinum*. Ibid.

In right patent, or right of ward.

In *nativo habendo*. 2 Inst. 312.

In *plegiis acquietandis*.

So, in debt for tithes. Dub. 1 Lev. 253.

(C 6.) By appeal.

So, the county court shall hold plea in an appeal of robbery, rape, or other felony. Vide Appeal, (F).

(C 7.) By replevin.

So, the county court may hold plea by writ of replevin of any value; for the writ is in nature of a commission. 2 Inst. 312. Vide Pleader, (3 K. 1, &c.)

So, in an *homine replegiando*.

So, a writ of re-caption may be sued in the county court before the sheriff and coroners.

Vide post, (C 8.)

[*](C 8.) By plaint.

So, the county court holds plea by plaint in debt, detinue, or other personal action, (not being *vi et armis*), under the value of 40s. 2 Inst. 312. 4 Inst. 266.

So, if the debt was originally above 40s., if the plaintiff by his declaration acknowledges the receipt of so much as reduces the debt under 40s.

So, it may hold plea by plaint of trespass, if it be not *vi et armis*: as, of a battery. 2 Inst. 312.

So, by the st. of Marl. 52 H. 3. 21. the county court may hold plea by plaint in replevin, though the cattle are of the value of 20l. 2 Inst. 139. 312. Vide Pleader, (3 K 2.)

But the county court cannot hold plea by plaint, in debt, detinue, or other personal action, of the value of 40s. or above; for *placita de debitis aut cattallis quæ summam 40s. attingunt aut excedunt sine brevi domini regis placitari non debent*. 2 Inst. 312. 4 Inst. 266. Vide Copyhold, (R 14.)—Courts, (B 3.)

And it ought to appear in the declaration to be under 40s. for if he counts to more, though the verdict finds less, he shall not have judgment. 2 Inst. 312.; or if he has judgment, it shall be reversed. R. 2 Mod. 206.

Neither can he divide a debt, and by several plaints demand under 40s. in each. 2 Inst. 312.

Nor can he join several debts in the same plaint, if they all amount to 40s. though each severally be under that value. R. 1 Vent. 65. 73.

Nor can he acknowledge satisfaction of part, falsely, to reduce the debt under 40s. R. Pal. 564.

[An action cannot be brought in the county court, even for a less sum than 40s., unless both the defendant reside, and the cause of action arise within the county, i. e. within the jurisdiction of the court. C. P. E. 32 Geo. 3. 2 H. Bl. 29. B. R. H. 35 Geo. 3. 6 T. R. 175. C. P. T. 37. Geo. 3. 1 Bos. & Pull. Rep. 75. B. R. E. 39 Geo. 3. 8 T. R. 235.]

[And where those circumstances do not concur, the action must be brought in a superior court. Ibid.]

So, the county court cannot hold plea *vi et armis*; for then a fine is due to the king, which cannot be assessed in a court not of record; and therefore, it shall not hold plea by plaint and trespass *vi et armis*. 2 Inst. 311. 4 Inst. 266.

Nor, of wounds and mayhem. 2 Inst. 312.

Nor, for deceit or maintenance.

Or, forging of a false deed.

So, it shall not hold plea in account against any, as receiver, though it be under 40s. for the sheriff cannot assign auditors, who are judges of record. 2 Inst. 380.

Nor, for debt upon a record or specialty.

So, it cannot hold plea, by plaint, concerning freehold.

Nor, in dower. 2 Lev. 123.

And therefore, if a man in a plaint in replevin, justifies, avows, or [*]makes consuance as in the freehold of B., the jurisdiction of the county court is ousted. 3 Lev. 196. 204.

So, it cannot hold plea of charters for land of freehold or inheritance. 2 Inst. 311.

Or, in an *homine replegiando*, where any one is committed for the death of a man, by command of the king, or of the justices, or for the forest. 2 Inst. 186, 7.

If the county court holds plea where it has no jurisdiction, the proceeding is *coram non judice*, and void, and trespass lies against any, who act under the process of the court. 3 Lev. 203.

And, if freehold, or other plea, which ousts the jurisdiction, be pleaded, all the subsequent proceedings are void. R. 3 Lev. 204.

And a *supersedeas* may be granted to such process. F. N. B. 239. D. H.

Every resiant within the county ought to do suit at the county court.

And for default of appearance when summoned, he shall be amerced.

So, he may have land by the tenure of doing suit at the county court.

[Since an action cannot be brought in the county court, unless the cause of action arise, and the defendant resides, within the county; though the debt be less than 40s. and the defendant reside within the county of X., if the cause of action did not arise within that county (as if it arise on the high seas,) the plaintiff may sue in a superior court. 1 B. & P. 223.]

[Trespass *vi et armis* cannot be brought in the county court. 3 T. R. 37.]

[A consequential injury done to the plaintiff's house by the defendant's court, is cognisable by the county court. 2 N. R. 84.]

[As to the county court of Middlesex, see, in relation to the subject matter of its jurisdiction, 14 East, 301. 1 B. & P. 29.; over personal representatives, Dougl. 246. 263.]

Vide Dismes, (M 5.)

(C 9.) Process.—Mesne.

Process in the county court shall be by summons, attachment and distress, infinite in all personal actions by plaint or justices, except in trespass.

In trespass, it shall be by attachment and distress infinite.

And the sheriff may by his precept award summons of the defendant by his goods, returnable in two or three days at his discretion. 4 Inst.

And the summons may issue two or three days before the court. Ibid.

And shall be directed to a bailiff. Ibid.

And the sheriff shall make the precept in his own name, though the suitors are judges. R. 3 Lev. 203.

And it shall be to the sheriff's bailiffs, not to special bailiffs. Semb. Lut. 1413.

If the defendant does not appear upon summons, an attachment shall go against him (and in trespass it is the first process,) directed to a bailiff *quod pon. per vad. & salvo. pleg.*, &c. Vide Process, (D 6.)

Upon which the bailiff attaches him by pledges, or his goods.

Or, it is sufficient that he warns him to appear, if he be returned warned.

[*]The bailiff shall keep the goods attached till the next court, and if the defendant then makes default, they are forfeited. Vide Process, (D 6, 7.)

If the defendant does not appear upon the attachment, a *distringas* shall go, by which the bailiff shall distrain the goods of the defendant, and keep them till he appears; and if he makes default, they are forfeited. Vide Process, (D 6. 7.)

And so *distringas in infinitum* till the defendant appears.

But a *capias* does not lie in the county court.

(C 10.) Judicial.

After judgment, process for damages and costs shall be made by *levari facias*.

But, a *levari facias* out of the county court ought to be *de bonis & catallis* only, and not *de terris & catallis*. Semb. Lut. 1413.

And the goods taken shall not be sold without a custom alleged for it. Semb. Lut. 1413.

Vide Copyhold, (R 18.)

(C 11.) Trial.

If a suit be in the county court by justices, the trial shall be by a jury.

So, by prescription, it may be in a suit by plaintiff.

But, without a prescription for it, in a suit by plaintiff, the trial shall be by wager of law, or examination of witnesses.

[Statute 23 G. 2. c. 33. empowers county clerk, and suitors in county court of Middlesex, to determine any plaintiff under 40s. in a summary way, and regulates the time of holding, and other methods of proceeding.]

(C 12.) Plaintiff.

Every plaintiff ought to be entered in writing *sedente curia*.

And the plaintiff must be present in person, or by attorney.

And shall find pledges. Vide Pleader, (3 K 5.)

(C 13.) Execution.

After judgment, execution shall be done, and the damages and costs levied (if the custom allows it) by a *levari facias*. Vide ante, (C 10.)

If the custom does not allow a *levari facias*, it shall be only by *distringas*, and detainer of the goods distrained as a pledge till the costs and damages are satisfied.

If the sheriff delays execution, a writ *de executione judicii* may be directed to him out of chancery to do execution.

And thereupon an *alias* and *pluries*, and attachment against the sheriff.

[(D) RATE.]

[The privilege of raising a county rate is incident to every county, and therefore to a town corporate erected into a county; and though the expenses to which such rate is applicable may hitherto have been defrayed by the corporation, yet as nonuser cannot destroy the privilege, it may be exercised now *de novo*, in exoneration of the corporate body. 6 T. R. 228.]

[The 17 G. 2. c. 5. s. 13., which places houses of correction for the county under the management of justices at quarter sessions, and requires them

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to be filled up and furnished, except such houses of correction as have been erected or maintained by any particular founders. A building given by a corporation for this purpose, and hitherto maintained by them, [*]is not within the exception; therefore a county rate may be levied to maintain it, in exoneration of the corporate body. 6 T. R. 228.]

[It is not a rule, that large and comprehensive words in the enacting clause of a statute are to be restrained by the preamble. Frequently, although a particular mischief is recited in the preamble, yet the legislative provisions extend far beyond it. Therefore a magistrate may, under the stat. 3 Jac. 1. c. 10. (and 27 G. 2. c. 3.) direct the expences of conveying a deserter, committed by him to gaol, to be paid by the treasurer of the county. The preamble of that statute speaks only of "felons and other malefactors, and offenders punishable by imprisonment in the county gaol," which does not apply to deserters; but the enacting clause is that "every person that shall be committed," &c. 3 M. & S. 62.]

[The necessity of making a rate, or the application thereof to its proper purpose, cannot be inquired into in a collateral proceeding, where the magistrates have the power of making it. 11 East, 168.]

[A town corporate with a separate commission of the peace, is a franchise within the stat. 13 Geo. 2. c. 18., though not a county in itself. 11 East, 168.]

FOREIGN COUNTY. Vide JUSTICES, (Y 14.)—PLEADER, (S 9. 11.—3 M 3.)

IN WHAT COUNTY AN ACTION SHALL BE SUED. Vide ACTION, (N 1, &c.)—ACTION UPON THE CASE FOR A CONSPIRACY, (C 2)—ACTION UPON THE CASE FOR A DECEIPT, (F 2)—APPEAL (E).

COUNTY CLERK. Vide ante, (C 1.)

CORONER IN A COUNTY. Vide OFFICER, (G 2, &c.)

KNIGHTS OF THE SHIRE. Vide PARLIAMENT, (D 5. 11.)

POSSE COMITATUS. Vide VISCOUNT, (C 2.)

Vide ADMIRALTY, (F 2.)—DISMES, (E 4.)—JUSTICES OF PEACE, (B 67.)—LEET, (O 3.)—LONDON, (H).

COURTS.

THE COURT OF CHANCERY. Vide CHANCERY.

THE COURTS OF SCOTLAND. Vide SCOTLAND, (D 10. &c.)

THE COURT OF PARLIAMENT. Vide PARLIAMENT.

THE COURTS OF COUNTY PALATINE. Vide FRANCHISES, (D 1, &c. 9.)

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THE COURT OF ANCIENT DEMESNE. Vide ANCIENT DEMESNE, (G 1, &c.)

THE COURT-BARON. Vide COPYHOLD, (R 1, &c.)

THE COUNTY COURT. Vide COUNTY, (C 1, &c.)—DISMES, (M 5.)

THE CUSTOMARY-COURT. Vide COPYHOLD, (R 2, &c.)

THE COURTS IN A FOREST. Vide CHASE, (R 1, 2.)

THE HUNDRED-COURT. Vide HUNDRED, (B)—DISMES, (M 5.)

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(A) ALL JUDICATURE REMAINS IN THE KING'S COURTS, &c.

The king has distributed all his power of judicature to divers courts. 4 Inst. 70.

And, therefore, the king himself cannot administer justice except by his justices. 4 Inst. 71. R. 12 Co. 64.

And if any one renders himself to the judgment of the king, it is of no effect, if he does not render himself to the king's court. 4 Inst. 71.

If the king himself sits in B. R. justice shall be administered by the judges. 4 Inst. 73. 12 Co. 64.

[*Superior.*—A superior court will decide questions not within its jurisdiction, which come incidentally before it. 1 T. R. 509. 3 T. R. 343.]

[And to the proceedings of one invested with judicial authority, credit must be given, unless he exceeds his jurisdiction; a principle which is not confined to courts of record. 2 T. R. 357.]

[But a party who institutes a proceeding in a court of justice, is not thereby estopped from afterwards questioning their jurisdiction touching that suit. 4 M. & S. 120.]

[Its jurisdiction cannot be ousted under an act of parliament, unless by express words, or by necessary implication. 4 T. R. 109.—Of which latter case, the stat. 25 Geo. 2. c. 51. furnishes an instance; which directs, that all penalties of 50*l.* created by it, shall be sued for in the courts at Westminster, and that it may be lawful for a magistrate to convict for penalties under 50*l.* with a power to mitigate them: these penalties can only be re-

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covered before a magistrate, since otherwise the power of mitigation could not be exercised. 3 T. R. 442.

[And for a demand under 40s. not cognizable by an inferior jurisdiction, the county court for instance, the plaintiff may sue in the superior courts. 6 T. R. 575.]

[And it is no objection to a suit in the superior courts that the demand is under 40s. unless it appears that there is an inferior court who could take cognizance of the cause. 8 T. R. 235.]

[Of record.—The power of fine and imprisonment for a contempt, is incident to every court of record. 8 T. R. 314.]

[Proceedings.—It is a general rule that nothing which depends on the proceedings of a court, can be proved by parol testimony. Therefore, in case of capture and recapture, neither the salvage nor the expences incurred in ascertaining the amount thereof (see 43 Geo. 3. c. 160. [*]s. 40.) can be otherwise proved than by producing the proceedings of the admiralty court. 2 N. R. 228.]

[Officers.—Experience in the office is a general criterion of fitness in those offices in the courts, which require knowledge of the business. 2 Anst. 624.]

(B) THE KING'S BENCH.

(B 1.) The extent of its jurisdiction.

The king's bench is held *coram rege*. 4 Inst. 71. 73.

[If by the king's pardon security is directed to be given, *qual. curia de banco nostro dirigeret*, it is the king's bench. P. 6 G. Str. 302.]

And antiently it was attendant upon the palace, or court of the king. 4 Inst. 71. 73. Mad. 539. 543.

The justices of B. R. have supreme authority. 4 Inst. 73.

And, therefore, have properly jurisdiction in all pleas of the crown; as high treason, felony, &c. 4 Inst. 71.

In all errors in fact, or in law, upon judgments by any other court of record in the kingdom, except the exchequer. 4 Inst. 71. Vide Pleader, (3 B 3.)

Though the felony, &c. is committed within the king's palace, for the st. 33 H. 8. 12. does not take away their jurisdiction. R. 2 Jon. 53.

So, B. R. may hold plea, by original out of chancery, in trespass *vi et armis*. 4 Inst. 71.

So, in replevin. 4 Inst. 71. 2 Inst. 23.

In rescous, forcible entry, &c. 2 Inst. 23.

In trespass, &c. *vi et armis* under 20s. or of whatever value. R. 3 Mod. 275. Carth. 108.

So, in ejectment, and all actions *vi et armis*. 2 Inst. 23.

So, in *quare impedit* by the king, though it be not *vi et armis*. 4 Inst. 71.

And in every other action brought by the king. 2 Inst. 23. 2 Rol. 167. l. 5.

So, B. R. may hold plea by bill, in debt, detinue, covenant, assumpsit, account, and all personal actions where the plaintiff has privilege as an officer or clerk of the court. 4 Inst. 72.

Or, where the defendant has privilege as an officer, or clerk of the court or being in *custodia mareschalli*. 4 Inst. 71. 2 Inst. 23.

Whether the defendant be in custody by commitment, or by *latitat*, bill of Middlesex, or other process. 4 Inst. 72.

Though it be in an action upon a statute, *valore maritagii*, &c. 1 Rol. 536. l. 50. 537. l. 45. Vide Action upon Statute.

So, if error be in B. R. upon a judgment in C. B. in a plea of abatement, and the judgment be reversed, B. R. may then proceed in the original cause. 4 Inst. 72. 2 Inst. 23.

So, B. R. may hold plea in an assise of novel disseisin; for it is a plaint, and not restrained by M. Ch. 9. H. 3. 11. which enacts that common pleas *non sequantur curiam nostram*. Ibid.

In a *scire facias* to repeal the king's patent. 4 Inst. 72.

So, in re-disseisin, &c. 2 Inst. 23.

So, B. R. has jurisdiction to correct and reform all errors and misdemeanors extrajudicial, which tend to the breach of the peace, or oppression of the subject. 4 Inst. 71.

[*]And therefore, if a corporation or others disfranchise or remove an officer, &c. without cause, or wrongfully refuse to execute a power or authority intrusted to them, B. R. will grant a mandamus. 4 Inst. 71. Vide Franchises, (F 31, &c.)—Mandamus (A—B.)

If a court, temporal or spiritual, exceeds its jurisdiction, B. R. will grant a prohibition. 4 Inst. 71. Vide Prohibition.

If any be imprisoned without just cause or authority, it will grant an *habeas corpus*. 4 Inst. 71. Vide Habeas Corpus.

So, B. R. is superior to the justices in eyre. 4 Inst. 73.

The justices of B. R. are the sovereign justices of oyer and terminer, gaol-delivery, and of the peace, &c. within the realm. 4 Inst. 73.

They are the sovereign coroners within the realm. Ibid.

And therefore, if B. R. sits in any county, the authority of justices in eyre, or other justices of oyer and terminer, gaol-delivery, &c. in the same county, ceases immediately. Ibid.

And B. R. may do all that the coroner, &c. can do. Ibid.

Yet if an indictment be removed before special commissioners of oyer and terminer, they may proceed upon it, though B. R. sits in the same county. 4 Inst. 73.

So, if an indictment be taken in Middlesex in the vacation, though B. R. sits there the next term, when B. R. is adjourned, special commissioners of oyer and terminer may proceed upon it. Ibid.

[By st. 25 G. 3. c. 18. from May 3, 1785. when any session of oyer and terminer, and goal-delivery shall have been begun to be holden for the county of Middlesex before the essoign day of any term, it may be continued to be holden, and the business finally concluded, notwithstanding the happening of such essoign day, or the sitting of B. R. at Westminster, or elsewhere in the county of Middlesex.]

So, B. R. is so high, that a record of that court shall not be removed if it be not warranted by act of parliament, but only the transcript of it. 4 Inst. 73. Vide Pleader, (3 B 13.)

So, a record removed into B. R., shall not be afterwards remanded. 4 Inst. 73. 1 Rol. 534. l. 45. 50.

[Where the proceedings originate in an inferior court, judgment must be given there; but where the proceedings are commenced in B. R., and the record is sent down to be tried below, the defendant is not properly convicted till the record is returned into B. R. The court of nisi prius is merely an emanation from B. R. and the proceedings must be returned into B. R. before judgment can be given. Per Ld. Kenyon, C. J. B. R. E. 30 Geo. 3. 3 T. R. 614.]

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[A judge of B. R. has power to grant warrants to be executed by all constables, &c. through England; and, on disobedience to it, attachment shall issue. T. 7 G. 2. B. R. H. 42.]

[But the king's bench cannot bail a man committed for a contempt of the house of commons. 1 Wils. 299.]

[The K. B. has the power of correcting the judgment of the sessions, under 9 Geo. 1. c. 7. s. 8., on the question whether reasonable notice of appeal has been given. 10 East. 404.]

[And may send down a record by *mittimus* to the county palatine of Chester to be tried therein. 7 T. R. 735., over-ruling 1 T. R. 363., as to this point.]

[So, the chief justice of the K. B. has the power of granting his warrant [*] to bring up an apprentice who has enlisted in the sea service, which he will exercise on application by the master. 7 T. R. 745.]

(B 2.) When B. R. has not jurisdiction.—Of common pleas.

But by the st. M. Ch. 9 H. 3. 11. all common pleas are restrained to C. B. 2 Inst. 22. 4 Inst. 71. 1 Rol. 536. l. 35.

As, *quare impedit*, and *quare incumbravit*. 1 Rol. 563. l. 40.

So, all real actions.

So, if a *quare impedit* be removed by error into B. R. and judgment affirmed; a *quare incumbravit* does not lie in B. R. for it is a new original. 1 Rol. 537. l. 40.

So, an action of debt upon a statute.

So, an action upon the statute of Winton, against the hundred, does not lie by original in B. R. for it is a common plea. Semb. 1 Rol. 536. l. 45. Vide Action upon Statute, (E 1.)

[Semb, that the court of K. B. have no jurisdiction to mitigate a fine imposed by an inferior court of record. 8 T. R. 615.]

[And where a submission to arbitration in a cause in the court of exchequer, is made a rule of the court of K. B., and by the award the costs are to be taxed by the master of the former court, that court has no jurisdiction to direct a review of the taxation. 1 Anst. 273.]

(B 3.) If the damages be not alleged at 40s.

So, By the st. Gloc. 8. a writ of trespass a man shall not have before the justices, if he does not affirm the goods taken away to be of the value of 44s. at the least. Vide County, (C 8.)

And therefore, generally, debt, detinue, covenant, &c. which does not amount to 40s. does not lie in a superior court. 2 Inst. 311. [4 T. R. 495. 499.]

But this does not extend, where the debt or damages are alleged at 40s. though the verdict finds a less sum. 2 Inst. 312. R. 19 H. 6. 8. b.

Nor, to trespass *vi et armis*, or other action, in which an inferior court has not jurisdiction.

Nor, to an action for costs, &c. given by a subsequent statute, though they are under 40s. C. Cro. El. 96.

[If the cause of action appears on the face of the declaration, to be only 20s. the court will stay proceedings; but not on affidavit, that the debt is such, if plaintiff demands more. M. 5 G. 3. 3 B. M. 1592. Barnes, 497.]

[If it appears to the court, though not on the record, that the cause of action does not amount to 40s. they will on motion stay the proceedings before

trial. C. P. E. 11 Geo. 3. 2 Bl. 754. B. R. M. 32 Geo. 3: 4 T. R. 495.]

[So, upon an affidavit made by the defendant, and not contradicted by the plaintiff, that the debt did not amount to 40s. the court stayed proceedings. B. R. M. 33 Geo. 3. 5 T. R. 64.]

[Debt for 20s. per ann. rent, damages 100s. is within the jurisdiction. Barnes, 497.]

[*](B 4.) Officers of B. R.—The judges, &c.

The chief justice of B. R. was antiently constituted by patent; but 25 Ed. 1. and from thenceforth, he was constituted by writ. 4 Inst. 74. 5. Vide post, (C 2.)

The other justices there are all made by patent. 4 Inst. 75.

And none but the chief justice can be made a justice, unless by patent, or commission. Ibid.

None can be a judge, if he be not before a serjeant at law. Ibid.

A grant of chief justice cannot be made to two. Hob. 153.

A judge of B. R. was antiently, and of later times constituted *durante beneplacito*. 4 Inst. 75. (By the st. 12 & 13 W. 3. 2. *Quamdiu se bene gesserint*. [Vide Justices, (C 2.)])

[Judges commissions not dependant upon the life of the king. 1 G. 3. c. 23.]

[Sergeants at law may be appointed in vacation, previous to becoming judges. 39 G. 3. c. 113.]

A judge of B. R. may be discharged by writ. Ibid.

The coroner, or clerk of the crown, shall be granted by the chief justice of B. R.

So, the chief clerk of the office *ad irrotuland. placita in B. R.* Skin. 354.

(C) THE COMMON BENCH.

(C 1.) The jurisdiction.

The C. B. seems to have been severed from the *curia regis*, 7 R. 1. or *tempore Joh.* and the severance was established by M. Ch. 17. Joh. & 9 H. 3. Mad. 539, &c.

And after the st. M. Ch. 9 H. 3. 11. all common pleas, were determined in C. B. 2 Inst 21. 4 Inst. 99.

And therefore all real actions shall be there determined. 4 Inst. 99.

All fines and common recoveries shall be there levied, and suffered. Ibid.

So, every action by original, real, personal, and mixt, may be sued there. Ibid.

So where the plaintiff or defendant has privilege, as an officer, minister or clerk of C. B., the action shall be there by bill, without an original. Ibid.

So, C. B. may award a prohibition to a temporal or spiritual court, which exceeds its jurisdiction, without original, or plea depending before them. 4 Inst. 99, 100. R. 12 Co. 109. Vide Prohibition.

So, it may award an *habeas corpus*, if any be imprisoned without cause. Vide Habeas Corpus.

So, C. B. has jurisdiction for the punishment of their own officers and ministers. 4 Inst. 100. [Vide Habeas Corpus.(A).]

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(C 2.) Officers of C. B.—The judges.

The judges of C. B. are all made by patent. 4 Inst. 100. Vide ante, (B 4.)

The king himself cannot be chief justice there.

[*](C 3.) Custos brevium, and chirographer.

The chief clerk of C. B. is the *custos brevium*, who is appointed by the king's patent. Dy. 176. a.

So, is the chirographer.

(C 4.) Prothonotary.

There are three prothonotaries in C. B.

The chief justice grants the office of chief prothonotary, and may revoke it, if he be insufficient, without the other justices. Dy. 150. b.

(C 5.) Exigenter.

So, the office of exigenter is, by prescription, to be appointed by the chief justice; and a grant of the office by the king, though during a vacancy of the office of chief justice, will be void. R. Dy. 175.

(D 1.) THE COURT OF EXCHEQUER.

The court of exchequer is an original court, time whereof, &c. held without commission as well as B. R. and C. B. 4 Inst. 103.

It began since the Conquest. Mad. 121.

In the exchequer are seven courts: 1. The court of pleas. 2. Of accounts. 3. Of receipt. 4. The court of exchequer chamber for matters of law adjourned *propter difficultatem*. 5. For error in the court of exchequer. 6. For errors in B. R. by the st. 27 El. 8. 7. For causes in equity. 4 Inst. 119.

(D 2.) The court of Pleas.

The court of pleas is held *coram baronibus in scaccario*. 4 Inst. 109, Vide Dett, (G 14.)

And has jurisdiction of all causes which concern the king's profit. 4 Inst. 113.

As, of debts or duties due to the king, 4 Inst. 103. 110. 112. 2 Inst. 551.

So, in matters which relate to tenures of the king *in capite*, or as of an honour, or manor, &c. 4 Inst. 110.

So, in matters which concern the lands, rents, franchises, hereditaments, goods, and chattels of the king. 4 Inst. 112. 2 Inst. 551.

By the st. 33 H. 8. 39. the court of exchequer, &c. shall have full authority to hear and determine all debts, detinues, trespasses, accounts, wastes, deceits, negligences, defaults, contempts, complaints, riots, suits, forfeitures, offences, &c. which shall grow, &c. upon any matter, &c. assigned, committed, &c. to the several orders of the same court, &c. or which may concern the same, where the king shall be only party.

And all estates for years between party and party concerning the premises.

And all estates, rights, titles, and interests, as well of inheritance as freehold, &c.

So the court of pleas in the exchequer has jurisdiction, when the plaintiff

or defendant has privilege as an officer or minister of the court. 4 Inst. 112. 2 Inst. 551. Pl. Com. 208. a.

So, if the defendant be a prisoner to the court of exchequer, he shall be privileged to be sued there in all personal actions. 2 Inst. 551.

[*]So, an accountant, or other who has a title to privilege there. 2 Inst. 551. Pl. Com. 208. a.

So, a servant to an officer there ; as, to the treasurer, &c. Sav. 10.

So, if the plaintiff be debtor to the king, he may sue in the exchequer against any, for a debt or duty to him, upon a suggestion. *Quo minus*, &c. 2 Inst. 551. 4 Inst. 111, 112. Pl. Com. 208. a.

So, the king's farmer for tithes, parcel of the possessions leased to him ; though the right of the tithes be in debate. 1 Rol. 538. l. 40. Hard. 177.

So, a suit between a parson and vicar for tithes, where the king is patron, ought to be in the exchequer. R. 1 Rol. 538. l. 45.

So, a prohibition to a libel in the spiritual court for tithes of a copyholder of the king's manor. R. 1 Rol. 539. l. 10.

So, trespass, &c. against him who distrains for an amerciament, &c. in the king's manor. R. 1 Rol. 539. l. 15.

Ejectment by him who claims title by an extent in aid. R. Hard. 193. 176.

Or, by him who has privilege. Sav. 10. 12.

Every action which concerns the king's revenue immediately. R. Hard. 193. 4 Inst. 112.

And if begun in another court, it may be removed. Hard. 176.

[The court will remove an action brought in another court for the seizure of a ship, though no information is filed here ; but after information tried here, and verdict for defendant, the court will not remove an action brought in another for the seizure. Sc. H. 1718. Bunb. 34.]

[The court will remove trover brought against an officer for goods seized and condemned, and also a great coat, saddle, &c. on affirmation that they were not seized, and only thrown in for a colour. M. 1731. Bunb. 309.]

[But the court will not remove an action brought in B. R. for taking ropes and cordage, against an officer who had seized two cables, one of which only was foreign (and actually condemned in this court). M. 1731. Bunb. 306.]

So, false imprisonment or other action against an under-sheriff may be in the exchequer, though the sheriff be the officer of the court ; for it takes notice also of the under-sheriff. R. 1 Rol. 539. l. 30.

So, if a man having privilege in the exchequer, begins a suit there, and afterwards sues the same defendant, for the same cause, in B. R., it shall be a contempt. Semb. Sav. 14.

So, the plaintiff in any case may sue for tithes, &c. in the exchequer, when he pays tenths and annates to the king. R. cont. 3 Leo. 258.

So, he may have debt there upon the stat. 2 & 3 Ed. 6. 13. for not setting out his tithes. Sav. 131.

But after the st. of M. Ch. 9 H. 3. 11. explained by the st. art. sup. Char. 28 Ed. 1. 4. common pleas (except in case of privilege) shall not be sued in the exchequer. 2 Inst. 23. 551. 4 Inst. 113. 1 Rol. 538. l. 50. 539. l. 5. Mad. 141. 145. 544. 594. Pl. Com. 208.

And an accountant shall not have privilege to be sued there, if he has not entered into his account. 4 Inst. 112.

So, a collector of tithes shall not. Ibid.

So, the king's debtor shall not have the privilege of the exchequer, if he be before sued elsewhere. 4 Inst. 112. Dy. 328.

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[*]Or, if his debt be discharged. R. Sav. 15. But Semb. cont. Sav. 33. R. Sav. 51.

So, if a suit be elsewhere, upon a collateral matter, which does not directly concern the king's revenue, it shall not be stayed upon pretence of privilege in the exchequer; as, if false imprisonment be in B. R. for an imprisonment for a fine imposed by commissioners of excise. R. Hard. 193.

So, a defendant sued there by information upon a penal statute, shall not have privilege to sue there, if he be not convicted, or does not confess the information. Sav. 53.

So, an officer, who becomes party by covin in order to obtain privilege, shall be disallowed. Sav. 12.

So, an executor has no privilege to sue there, if he only alleges that the defendant does not pay, *quo minus*, &c. he is able to pay his debt to the king; for he cannot pay it with his testator's money. Sav. 39.

So, an information by a common informer does not lie in the exchequer upon a penal statute, which gives remedy only before justices of peace, oyer and terminer, assise, &c. R. Sav. 6.

Otherwise by the attorney-general. Sav. 134.

Semb. that it lies if no court is directed by the statute. Hard. 420.

So, a plaintiff in a suit by English bill, or in the exchequer-chamber, has no privilege to be sued in the exchequer only. Sav. 51.

So, a servant to an officer in the exchequer shall not have privilege there, if he be not attendant upon his person as a menial servant, or upon his office. Bro. Privilege, 8. 16.

If a suit be in the exchequer, where the parties have no privilege, &c. it will be *coram non judice*. Sav. 36.

[The court of exchequer having jurisdiction over all matters relating to the revenue, can controul the conduct of the commissioners for auditing the public accounts. When the interposition of this authority is desired upon merely equitable grounds, and upon complicated facts, the court will not proceed upon motion or petition, but only upon bill or information. 3 Anst. 743.]

[Its peculiar jurisdiction takes place, 1. Where any matter, properly cognizable in the exchequer, is drawn into question in another court. 2. Where the matter of the suit touches the profit of the king. 1 Anst. 210.]

[An acquittal in the exchequer was considered by lord Kenyon to be conclusive evidence of the illegality of the seizure. 5 T. R. 255.]

[And a condemnation in the exchequer alters the property. 2 Blk. 977.]

[And is conclusive against all the world. 5 T. R. 117.]

[And, where proceedings *in rem* have been instituted, is conclusive evidence in any other court, as to all the world, that the goods were liable to be seized. 7 T. R. 696.]

(D 3.) The court of accounts.

The barons of the exchequer are the sovereign auditors of the kingdom, 4 Inst. 115.

This court is held *coram thesaurario & baronibus*.

And may audit all accounts of officers, and others accountant to the king. 4 Inst. 113. Mad. 628.

Which may be audited in court, or by commission upon the st. 6 H. 4. 3. 4 Inst. 117.

[*]And ought to be given upon oath. 4 Inst. 113.

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Divers officers ought to account annually; as the treasurer of Ireland, keeper of the wardrobe, &c. 4 Inst. 113. 117.

So, a sheriff, escheator, aulnager, comptroller, &c. Vide Viscount, (G 1, &c.)

It is more for the benefit of the king, that the account be taken by the court than by commission. 4 Inst. 113.

But the treasurer of the king's chamber shall account only to the king, and not in the exchequer. Ibid.

As to account before auditors assigned by the court, or in equity, vide Accompt, (E 7, &c.)—Chancery, (2 A 1, &c.)

As to account in the exchequer by a sheriff, vide Viscount, (G 1, &c.)

(D 4.) The court of receipt.

The court of receipt is entirely under the treasurer. Ld. Som. Arg. 54.

The principal officers of this court are, the treasurer, and chamberlains. Sav. 38.

Under them are the clerk of the pells, and four tellers, and the auditor of the receipt. Vide post, (D 14, 15.)

By the st. 8 & 9 W. 3. 28. a teller, on receipt in his office of any money, &c. shall without delay throw down into the tally-court (if the officers be there,) a bill or bills for the money, but not till the receipt, whereby a tally may be struck for it.

And the first clerk in the offices of the auditor of the receipt, of the clerk of the pells, and of the four tellers, shall be sworn to performance of duty.

The auditor of receipt, for fee, shall enter and inroll all patents and letters of privy seal for issuing the king's treasure, and draw the orders, or make the debentures for issuing it, and keep entries thereof, &c. shall weekly take the teller's accounts, and make certificates of all receipts, issues, and remains, &c. and of all monies imprest, and transmit the imprest rolls to the king's remembrancer, &c.

The clerk of the pells shall inroll all such patents and letters of privy seal, record the teller's receipts and issues, certify them to the treasury, examine the imprest, certificates, and rolls, &c.

[It is no office of record, except in matters relating to the king's revenue. M. 1744, 3 Atkyns, 197.]

(D 5.) The exchequer-chamber.—For causes of difficulty.

If the court of B. R. or C. B. be equally divided, or apprehend great difficulty in the case, it may be adjourned into the exchequer chamber, to be argued by all the justices of England. Co. L. 71. b.

And this was by the st. 14 Ed. 3. 5., for before it was determined by parliament. Co. L. 72. a.

And now by the same statute, if the justices in the exchequer-chamber are equally divided, it shall be determined at the next parliament by a prelate, two earls, and two barons, with the advice of the lords chancellor and treasurer, the judges, and other of the king's council as shall be deemed convenient. Co. L. 71, 2.

If after adjournment a judge dies, the cause goes on. 2 Bul. 146, 7.

If after argument, another judge be made, he shall not give his opinion. 2 Bul. 147.

But it shall not be adjourned to the exchequer-chamber upon motion

[*]before argument, and after argument only, if the court be divided, or for difficulty adjourn it of themselves. R. 2 Bul. 146, 7.

[The exchequer-chamber cannot award a writ of inquiry. Ld. R. 10. B.]

(D 6.) For errors.

So, by the st. 31 Ed. 3. 12. error in the exchequer shall be examined in the exchequer-chamber before the chancellor and treasurer, taking to them justices and sages, whom they think meet, and calling before them the barons to hear the causes of their judgment. Vide Pleader, (3 B 4, 5.)

[After this statute, if the court was adjourned, and at the day of adjournment, both the lord chancellor and the lord treasurer did not attend, the writ of error was discontinued, and the plaintiff in error obliged to begin anew.]

[To remedy this, it is enacted by st. 31 El. c. 1. s. 1. that the not coming of the lord chancellor, and lord treasurer, or of either of them, at the day of adjournment, shall not be a discontinuance of the writ of error: but if both the chief justices of either bench, or any one of the said great officers, be present at the adjournment day, the suit shall proceed in law, to all intents and purposes, as if both these officers were present.]

[But this statute did no provide a remedy for the absence of these officers at the day of the return of the writ.]

[Therefore it is provided, by st. 16 Car. 2. c. 2. s. 2. that if both the chief justices, or either of them, or any one of the said great officers be present at the day of the return of the writ, it shall be no abatement or discontinuance, but the suit shall proceed as if both the lord chancellor and lord treasurer were present.]

[But both these statutes having provided that no judgment should be given, unless both the lord chancellor and lord treasurer should be present; it was enacted by stat. 20 Car. 2. c. 4. that judgment might be given in writs of error in presence of the lord keeper, notwithstanding the absence of the lord treasurer.]

And by the st. 27 El. 8., error in B. R. in debt, detinue, covenant, account, action upon the case, trespass, and ejectment, shall be examined there by the justices of C. B. and barons of the exchequer.

[By st. 31 El. c. 1. s. 2. any three of the judges and barons may receive and continue writs of error from the king's bench.]

[But by s. 3. no judgment shall be given in such error, unless by the full number of six justices and barons.]

By the st. 31 Ed. 3. the chancellor and treasurer of England are the judges, and not the treasurer of the exchequer. 4 Inst. 105. Vide Pleader, (3 B 5.)

And therefore, the writ of error ought to be directed to the treasurer of the exchequer and barons, to bring the record of the judgment before the lord treasurer and chancellor; for the treasurer of the exchequer and the barons have the custody of the records there. 4 Inst. 105. Say. 36. 39.

Before the st. 31 Ed. 3. 12. all errors in the exchequer were redressed in parliament, or by the king's commission. 4 Inst. 105, 6.

[The exchequer-chamber may try a release of errors, and award a venire under the seal of the court of exchequer. H. 2 G. 2. Str. 821.]

[*](D 7.) For causes in equity.

A court of equity has been held in the exchequer-chamber, time where-
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of, &c. before the lord treasurer, chancellor, and barons, and did not begin by the st. 33 H. 8. 39. Semb. 4 Inst. 119. Vide 4 Inst. 109.

And the jurisdiction extends to all causes which concern the king, or his profit. 4 Inst. 118.

Or, where the plaintiff or defendant has privilege there. Vide ante, (D 2.)

So, if there be a suit by one who has privilege, there may be a cross bill without privilege. R. Hard. 160.

There may be a suit for tithes by English bill in the exchequer-chamber. Vide Dismes, (M 13, &c.)

So, every cause, which may be sued in the duchy-court, may be commenced in the exchequer-chamber. Hard. 171.

So, a bill in the nature of false judgment may be brought in the exchequer chamber, for reversal of a judgment against a copyholder in the king's manor. R. 1 Rol. 539. l. 20. Vide Copyhold, (P 2.)

So, a bill for a thing, which concerns the inheritance of the king, may be brought here; for it is a court of revenue, as well as a court of equity. Hard. 50.

So, upon a bill here, a mill erected within the king's manor, where the king has the multure to his mill there, may be removed. Hard. 175.

And if a mill be erected out of the manor, though it be not removed, grist there by the king's tenants shall be restrained. R. Hard. 175. 177.

But the mill shall not be demolished. Hard. 175. 184.

So, any nuisance to the inheritance of the king, may be there redressed. Hard. 162.

So, by the st. 33 H. 8. 39. if any, against whom a debt or duty is demanded for the king, can shew any matter in law or good conscience in discharge, &c. the court shall have power to discharge, &c. And therefore, he may have relief by English bill, as well as by plea. R. 7 Co. 19, 20. Sir Thomas Cecil.

But a matter of freehold shall not be determined upon a bill, without a trial at law. Vide Chancery, (X—4 V.)

Though it concerns the freehold of the king. R. per two J. Parker cont. 1656. Hard. 51.

So, the plaintiff ought to allege himself debtor and accomptant to the king, in a bill, as well as in an action; otherwise the court has not jurisdiction. Vide ante, (D 2.)

So, if the plaintiff sues in his own right, and also as administrator to B., he ought to allege himself debtor, and also that B. was debtor; otherwise there is no jurisdiction to sue as administrator. R. Hard. 60.

[If a bill be preferred for a matter or sum below the dignity of the court, it may be dismissed on motion, or on demurrer. Per Price B. M. 1717, Bunb. 17.]

[But if there is fraud, or complicated matter, it will be retained. Ibid.]

For proceedings in the causes in equity in the exchequer, vide the similar articles in title Chancery.

[*](D 8.) The officers of the exchequer.—The lord treasurer.

The first officer of the exchequer is *dominus thesaurarius Angliæ*. 4 Inst. 101. Vide Officer, (E 1.)

Who was antiently constituted by the delivery of a golden key; and now, by the delivery of a white staff. 4 Inst. 104.

The lord treasurer of England has now, by letters patent, granted to him

the treasury of the exchequer, which was antiently a distinct office. 4 Inst. 105. Mad. 568.

By his oath he is bound to serve the king truly in his office, to do right therein to all, truly to keep and dispend the king's treasure, truly to counsel the king, and his counsel keep, not to know nor suffer the king's hurt, or disinheriting if he can let it, if not, to disclose it clearly to the king, and to purchase the king's profit all he reasonably may. 4 Inst. 104.

As treasurer of the exchequer, he with the barons has the custody of the records of the exchequer. 4 Inst. 105.

He ought to have a warrant for the disposing of all treasure which he disposes of; for having only the custody of the treasure, he cannot dispose of it *ex officio*. Mo. 476.

(D 9.) The chancellor.

The chancellor of the exchequer has the custody of the seal of the exchequer. 4 Inst. 104. 119. Mad. 580.

And now has usually the office of under-treasurer of the exchequer. Mad. 578.

And is comptroller of the pipe. 4 Inst. 106.

And appoints the two appraisers of goods seised for not paying customs, and directs whether the party shall have them at such price, or not. 4 Inst. 104.

And, in the vacancy of a treasurer, does every thing in the receipt of the exchequer, which the treasurer may do. 4 Inst. 104.

(D 10.) The barons.

The chief baron and the other barons of the exchequer are constituted by letters patent. Mad. 582. 4 Inst. 117.

And were antiently barons and peers of the realm. 4 Inst. 103. in marg.

The treasurer and barons are the principal officers of the exchequer. Sav. 33.

The barons are the sole judges of the court of pleas; though the treasurer of the exchequer is joined with them in the custody of the records of the court. 4 Inst. 105. 109.

And shall take an oath to do right to all, &c. 4 Inst. 109. Mad. 586, 7.

They may discharge and respite debts due to the king. Mad. 137.

But the court of equity there, is before the treasurer, chancellor and barons. 4 Inst. 109.

(D 11.) The chamberlains.

The chamberlains of the exchequer have their office usually for life, *exercendum per se aut deputat*. 4 Inst. 106.

And appoint two deputies. 4 Inst. 107. Mad. 732.

[*]Antiently they had the keys of the chests, weighed the money, and laid up the bags of 100*l*. Co. L. 106. a.

And now they have the keys of the treasury, where the records of leagues, doomsday-book, pleas of justices in eyre, and of the forest, &c. are. 4 Inst. 106. Co. L. 106. a. Compl. Att. in Exch.

But they cannot use their keys till the auditor of receipt brings the key of the treasurer. Compl. Att.

So, the custody of the treasure and record belongs to them jointly with the treasurer. Mo. 475.

To them belongs the office of one of the door-keepers of the receipt. 4 Inst. 106.

Their under-chamberlains cleave the tallies, and read them when written by the clerk of the tallies, that the clerk of the pells and comptroller of the pells may see their entries be true. 4 Inst. 107.

(D 12.) Remembrancers.

There are three remembrancers, of the king, of the treasurer, of the first-fruits. 4 Inst. 106. Mad. 714.

The two first are in the king's gift, and have each two secondaries. 5 Inst. 106, 107, 108.

By the stat. 5 R. 2. 14. the said two remembrancers shall be sworn to see all writs of the great or privy seal, sent to the exchequer for discharge of any person of any demand in the exchequer, put into due execution by those to whom it pertaineth. Vide 37 Ed. 3. 4.

And shall every term make a schedule of all so discharged, and send it to the clerk of the pipe, &c.

The king's remembrancer, by his office, ought to make process against collectors of the customs, &c. enter in his office all recognizances acknowledged before the barons, take bonds for the king's debts, &c. and make process upon them, make process upon all informations upon penal statutes (which are entered in his office) and bills of composition upon them, enter the stallment of debts, keep all conveyances, &c. of lands, &c. granted to the king; and all proceedings by English bill are entered there. 4 Inst. 108.

So, he ought to tax all bills of costs in the exchequer. Rules and Orders in Exchequer, 16. Rule, 42.

The treasurer's remembrancer makes process by *feri facias*, and extent for the king's debts, &c. enters upon record if accomptants pay their profers, &c. 4 Inst. 108.

But, if a remembrancer be made a baron of the exchequer, his patent shall be void. Dy. 197. b.

[In the king's remembrancer's office, there must be à *bona fide* service of five years before one can be a clerk. 2 Anst. 489.]

[But if, upon the death of a clerk, there is only one in the office who has served a clerkship, he cannot compel the remembrancer to appoint. 2 Anst. 486. 624.]

[The treasurer's remembrancer, in the appointment of clerk in his office, is limited to those who have served a clerkship there. 3 Anst. 483. 616.]

(D 13.) The clerk of the pipe.

The clerk of the pipe is, by his patent, described to be *ingrossator magni rotuli in scaccario*. 4 Inst. 106. Mad. 717.

[*]And all accounts and debts to the king are collected out of the offices of the king's and treasurer's remembrancer, and put into a great roll, called the pipe, and then they are duly charged. 4 Inst. 106.

He has also a roll of reversions, which comprehends grants for years, for life, and in tail, without rent, &c. to the intent that a writ may issue, if need be, to enquire whether the lessee be dead, or the entail determined. Ibid.

There are two secondaries of the pipe. 4 Inst. 107.

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The chancellor of the exchequer is comptroller of the pipe. Vide ante, (D 9.)

(D 14.) The auditors, &c.

There are five auditors in the exchequer, who take and audit all accounts of receivers, collectors, &c. 4 Inst. 106.

The auditor of the receipt, who files and enters the bills of the tellers certifies to the lord treasurer every week the money received, makes a debenture to each teller before he pays any money, and audits their accounts. 4 Inst. 107.

He has also the custody of the black book of receipts, and of the lord treasurer's key: and sees that the tellers lock up their money in the treasury. 4 Inst. 107.

There are two auditors of the prest, who audit all accounts of money imprest to any person. 4 Inst. 107. And foreign accompts. Mad. 729.

But an auditor cannot determine whether a licence or grant be good. 4 Inst. 106.

Neither can he put any thing in charge; for he only audits accounts. Ibid.

Neither can he make a super but only money received and audited before. 4 Inst. 167,

(D 15.) Foreign opposer, &c.

The foreign opposer opposes all sheriffs &c. in their accounts of the green-wax, viz. of all fines, issues, amerciaments, recognizances, &c. for which process is sent to the sheriff, sealed, with green-wax. 4 Inst. 107.

The clerk of the estreats provides that summons for all fines, &c. estreated into the exchequer be issued. Mad. 731.

The clerk of the nichils makes a roll of the sums in process, for which the sheriff returns nichil, and delivers it to the treasurer's remembrancer. 4 Inst. 107.

The clerk of the summons. Ibid.

The clerk of the pleas has the office in which all suits are entered. Ibid.

The clerk of the tallies, who makes tallies for debt, or for reward. 4 Inst. 107, 8.

The clerk of the pells enters all receipts or bills of the tellers, in *pelle receptorum*; and all payments in *pelle exituum*. 4 Inst. 108. Mad. 739.

There are four tellers, who receive all money for the king, give a bill of receipt to the clerk of the pells, who charges them; pay all money by warrant of the auditor of the receipt, and make a book of receipts and payments for the lord treasurer. 4 Inst. 108. Mad. 739. Vide ante, (D 4.)

[*]The usher of the exchequer is an antient officer, who has under him four under-ushers. Mad. 718. Dy. 213. b.

The usher of the receipt.

The pesor and fusor who weigh and melt the coin paid in the receipt of the exchequer. Mad. 540, 1.

The marshal has the custody of debtors committed during the term, receives all offices found *virtute officii*, and delivers them to the treasurer's remembrancer, and appoints auditors for the accounts of sheriffs, &c. 4 Inst. 107. Mad. 725.

Vide 4 Inst. 107, 8.

[(D b.) INFERIOR AND NISI PRIUS COURTS.]

[*As to its jurisdiction.*—Though an inferior court has originally jurisdiction, yet if pending the suit a question, necessary to be determined in the cause, arises, of which they have not cognizance, their jurisdiction is ousted-altogether. 1 T. R. 552.]

[The principal point in the case of, 5 Mod. 248. 218. Salk. 580. and Skinner 674., under consideration was, the course of replevying in a hundred court; that the court took upon itself to decide what must be such course, because every hundred court is derived out of the hundred court, and can have no power which the country court has not; and because, as the powers of a county court depend not upon the particular charters by which each court may happen to be constituted, but upon the jurisdiction and course of proceeding generally incident to that description of court at common law; every superior court must know what is the jurisdiction and legal course of proceeding in such courts throughout the realm. It concludes nothing, however, as to courts which owe their jurisdiction, not to the common law, but to particular charters or to prescriptions, which pre-suppose such charters, and where the extent of jurisdiction and the course of proceeding may depend entirely upon the terms in which the franchise was originally granted. That other inferior courts may have a prescriptive right to hold plea of replevin by plaint, though hundred courts cannot, is admitted by, &c. &c. 4 M. & S. 120.]

[*Removal of causes from.*—If a defendant removes a cause whether by *recordari* or *habeas corpus*, from an inferior (here the county) to a superior court, the plaintiff is bound to follow him; so that if he does not, the defendant may sign judgment of *non pros*. 1 T. R. 371.]

[If the defendant in an inferior court removes the cause by *habeas corpus* to a superior court, the plaintiff is not bound to follow him there; so that judgment of *non pros* for want of a declaration cannot be signed. It, however, the plaintiff takes any step in the cause after it has been removed, he is bound to proceed. The cause is not effectually until bail has been perfected (the defendant having been arrested), so that any interference by the plaintiff before the bail have justified, is not taking a step after removal. 3 M. & S. 93.]

[If jurisdiction be given to an inferior court of common law to try a new offence created by statute, the proceedings may be removed by *habeas corpus cum causa* or *certiorari*, unless expressly prohibited, *secus* where the statute creating the offence prescribes a special jurisdiction not known to the common law. Cowp. 523.]

[The record and proceedings of an inferior court imposing a fine [*] cannot after the fine has been estreated into another court having competent jurisdiction over the subject matter, be removed into the K. B. Therefore a *certiorari* to remove the record and proceedings out of a court leet, imposing an amercement which had been estreated into the duchy chamber of Lancaster and paid, was refused. 2 T. R. 184.]

[Where an indictment for felony has been removed from an inferior court, in order to outlaw the defendant, if he appear before the outlawry is complete, a *procedendo* will be awarded under stat. 6 Hen. 8. c. 6. 5 T. R. 478.]

[If a defendant convicted on an indictment before an inferior jurisdiction, wish to object in a superior court to errors on the record, he should bring [*330]

error on the judgment, and not remove the record by *certiorari* between conviction and judgment. 6 T. R. 145.]

[A *certiorari* will not be granted to remove an indictment from an inferior jurisdiction, after conviction and before judgment, in order to grant a new trial. 13 East, 411.]

[An indictment cannot be removed from an inferior jurisdiction, between conviction and judgment, unless the punishment annexed be certain. 13 East, 414.]

[Where the statute creating a new offence, directs that it shall be prosecuted in a particular inferior court, the proceedings in which happen to be according to the course of the common law, and which are not changed by the statute, such prosecution is removable in the superior court of K. B., unless the jurisdiction of that court is taken away, not by inference from general expressions, but in express terms. But if the inferior court does or is to proceed contrary to the forms of the common law, so that the course of proceeding in the inferior and the superior courts are different in prosecution, cannot be removed; since, by prescribing the inferior court, the statute has directed that the offence shall be prosecuted in a particular form; now to remove would be prosecuting it in a manner different to that prescribed, for the superior court have jurisdiction to proceed according to common law only, and not according to the forms of the inferior court. The 52 Geo. 3. c. 155. s. 12. affords an illustration of the first part of the foregoing proposition. The offence thereby created is, disturbing a religious assembly; and it provides that "the offender, upon proof before any justice of the peace by two or more credible witnesses, shall find sureties to answer for such offence, and in default of such sureties, shall be committed till the next general or quarter sessions: and upon conviction of the said offence at the said general or quarter sessions, shall suffer the penalty 40l." Now the proceedings at the sessions, and in the K. B. by indictment, are similar; and the statute has not prescribed a form different from the usual one, neither has it confined the prosecution to the sessions; therefore it may be removed by *certiorari* into the K. B. before trial. That provision respecting the two witnesses does not relate to the prosecution, but to the apprehension of the offender. Had it required two witnesses to convict him, this mode of proceeding being contrary to the common law, and therefore to the mode of proceeding in the court of K. B., the indictment could not have been removed before trial. 4 M. & S. 508.]

[Proceedings against bail by *scire facias* cannot be removed from an inferior court to which the original cause removed therefrom had been sent back by *procedendo*. 6 T. R. 365.]

[*][An information *qui tam* upon 8 Geo. 1. c. 27. for a fraud in weighing and packing butter, exhibited in the sheriff's court at York, may be removed into B. R. by writ of *habeas corpus cum causa*. Cowp. 523.]

[In an inquisition by an inferior jurisdiction, the foundation of their jurisdiction must appear therein. 4 Burr. 2244.]

[*Nisi Prius*.—A judge at *nisi prius* may receive affidavits in support of an application to put off the trial. 4 T. R. 235.]

[There are no words in the st. 14 Hen. 6. c. 1. expressly empowering the justice of *nisi prius* to enquire of felonies; though such has been the uniform practice from the time of that statute to the time of the statute 25 Geo. 2. c. 37. 4 M. & S. 442.]

[A judge at *nisi prius* must be considered to all intents as acting under [*331]

the authority and as an emanation of the court whence the record itself emanates. 4 T. R. 292.]

[A conviction at nisi prius on an information out of the court of king's bench is, in legal operation, a conviction before the court itself. 16 East, 404.]

(E) THE COURT OF CHIVALRY.

(E 1.) Who are the judges.

The court of chivalry, or court martial, is held before the lord constable, and earl marshal of England. 4 Inst. 123. Ca. Parl. 66. Vide Officer, (E 2, 3.)

The constable was antiently constituted for life, or for him and his heirs; but 13 H. 8. it was forfeited by the attainder of the duke of Bucks, and was never after granted but *pro hac vice*. 4 Inst. 127. Spel. Gl. 146.

But the earl marshal cannot hold plea without the constable. Ca. Parl. 66.

Not for the marshalling of funerals, arms, &c. R. cont. 1 Sid. 352. 1 Lev. 230. Acc. Ca. Parl. 66.

And therefore, where the king refuses to make a constable, the plea cannot be determined in the court of chivalry. Co. L. 74. b.

(E 2.) What jurisdiction it has.

By the st. 13 R. 2. st. 1. c. 2. it is declared, that this court has cognizance of contracts touching deeds of arms, and of war out of the realm. Vide Co. L. 391. b. 4 Inst. 123.

And of things which touch war within the realm, which cannot be determined by the common law; with other usages and customs to the same matters pertaining.

The plaintiff shall by his petition declare plainly his matter, before any shall be cited to answer thereto.

And therefore, if a man be accused of treason, misprision, &c. done out of the realm, it shall be tried before the constable and marshal. 4 Inst. 124.

And though by the st. 26 H. 8. 13., 35 H. 8. 2., and 5 Ed. 6. 11. treasons and misprisions, &c. may be inquired of in B. R. or before special commissioners, if done out of the realm, as well as done in it; yet this does not take away the jurisdiction of the constable and marshal. 4 Inst. 124. 2 Rush. 107.

[*]So, murder, homicide, &c. out of the realm, shall be tried upon appeal before the constable and marshal. Co. L. 74.

So, if the mortal stroke be given out of the realm, though the death be within the realm. Co. L. 74. b.

So, the court has an absolute jurisdiction, by prescription, in matters of honour, pedigree, descent, and coat armour. 4 Mod. 128.

But by the st. 13 R. 2. st. 1. c. 2. if a plea be commenced before the constable and marshal of any matter that may be determined by the common law of the land, a privy seal shall be directed to the constable and marshal to surcease, &c.

So, by the st. 8 R. 2. 5. all pleas that ought to be discussed at common law, shall not be held before the constable and marshal.

And therefore, a prohibition lies, as well as a privy seal, if the court pro-

ceeds upon a matter out of their jurisdiction. R. Ca. Parl. 63. Adm. 4 Mod. 128.

As, if the suit be there, for the ordering of a funeral. Ca. Parl. 64.

For encroachment upon the office of an herald; for an action upon the case lies for it at common law. Ca. Parl. 65.

So, the constable and marshal have no jurisdiction of a thing done upon the high sea, though it be out of the realm, for it belongs to the admiral. 4 Inst. 124.

So, the marshal has no jurisdiction alone, if no constable be made, at least, *pro hac vice*. 2 Rush. 107.

The court of chivalry proceeds according to the usages and customs of the same court. 4 Inst. 125.

And if the usage fails, according to the civil law in the case of arms. 4 Inst. 125. Co. L. 391. b. 2 Rush. 107.

The trial in the court of chivalry shall be by combat, or by the testimony of witnesses. Co. L. 74. a.

As to trial by combat, vide Battle.

By attainder upon a judgment in the court of chivalry, lands are not forfeited, nor the blood corrupted. 4 Inst. 125.

After sentence in the court of chivalry, the party grieved may appeal to the king. Ibid.

[Under the mutiny act, courts martial in Gibraltar, and other places beyond the seas, wherein there is no civil judicature, have a discretionary power in the trial and punishment of offences; therefore they are not bound to proceed according to the municipal law of England. 1 East, 306.]

(E 3.) What officers belong to the court.—The heralds.

The heralds are officers attendant upon the court of chivalry. 4 Inst. 125.

There are three kings of arms, Garter, Clarencieux, Norroy; and each of them has several heralds under him. Vide Norroy.

A king of arms shall be created by the king's patent.

And the title of garter, &c. king of arms is parcel of his name.

So, a herald shall be created by patent. 4 Inst. 127.

And he shall be a complete officer by his patent, though he has no other investiture. R. Noy, 150.

And though he never was pursuivant, yet by the rules of the office this is required. Noy, 150.

The heralds were incorporated by R. 3. and afterwards by charter 3 Ph. & M. 4 Inst. 126.

[*]And by patent 3 Ed. 6. they are discharged of all tolls, subsidies, &c. Ibid.

It belongs to garter king of arms, to marshal all public funerals of the nobility, and to clarencieux and norroy, the public funerals of the gentry, and to direct what banners and arms shall be used. R. per. three J. 1 Sid. 353. Vide Ca. Parl. 63. 4 Inst. 126.

(F) THE COURT OF MARSHALSEA.

The court of the marshalsea is held before the steward and marshal of the king's household. 4 Inst. 130. 10 Co. 72. a. 6 Co. 12. a.

And it has original jurisdiction within the verge, viz. within the circuit of twelve miles round the mansion of the king. 4 H. 6. 8. 4 Inst. 130. Ld. Bac. Charge at the sessions of the verge. Vide the st. 33 H. 8. 12.

The jurisdiction was general, by the common law, in all causes, criminal and civil, real, personal, and mixt, within the verge, as justices in eyre, or vicegerents of B. R. there : but this is now taken away by the st. Art. sup. Chart. 3. 10 Co. 71. 2 Inst. 549.

And now the coroner within the verge may inquire of murder, homicide, &c. done within the verge, with the coroner of the county, by the st. 28 Ed. 1. Art. sup. Chart. 3.

And his authority is the same with the coroner of the county. R. 4 Co. 46. Vide the st. 33 H. 8. 12.

But B. R. justices of gaol-delivery, of the peace, &c. have a general jurisdiction, and may inquire of felony, &c. within the verge. R. 4 Co. 46.

And if the coroner of the county be also coroner of the verge, an indictment before him is good. R. 4 Co. 46. a.

So, there was also a particular jurisdiction in the marshalsea by the common law, confirmed by the st. 28 Ed. 1. Art. sup. Chart. 3. to have cognizance of trespass *vi et armis* within the verge, where the plaintiff or defendant was of the king's household ; and of debt, and covenant, when both were within the king's household. 12 Co. 71, &c. 2 Inst. 548. R. 6 Co. 20. b. Conf. by the st. 15 H. 6. 1. D. 1 Sid. 180.

So, there is the palace-court in the marshalsea, which has jurisdiction within the verge of twelve miles, though neither party be of the household. Sal. 439.

[Where process has issued to arrest persons residing within the boundaries of the palace court, it has been usual to obtain permission from the king for that purpose, signified by the officers of his household, and the writs have in such instances been backed by the clerk of the board of green cloth ; but for many years past, civil process has been executed within the said boundaries without such leave. However, an indictment will not lie against an officer of the palace-court for arresting a person not of the king's household against whom a writ has issued out of the court, though no leave to make the arrest had been obtained from the board of green-cloth. T. 30 Geo. 3. 3 T. R. 735.]

But the marshalsea cannot hold plea of freehold.

Nor, of trespass upon the case, or other trespass which is not done *vi et armis*. 2 Inst. 548. 10 Co. 76. a.

Nor in ejectment.

[]Nor, in trover, assumpsit, &c. 10 Co. 76. a. R. unless both parties are of the household. 2 Rol. 498.

If the marshalsea holds plea of a thing done out of the verge, the proceedings are void, and *coram non judice*. Pl. Com. 37. b.

So, in trespass, when neither party is in debt and covenant, when both are not of the king's household. R. 10 Co. 77. a.

If the plaintiff or defendant be alleged falsely to be of the household, by the st. 15 H. 6. 1, it may be averred to the contrary ; or the party may have a supersedeas directed to the steward and marshal. 10 Co. 75. b.

The marshalsea is a court of record. 10 Co. 69. b.

The proceedings are by bill, and not by original. 10 Co. 73. a.

If the king's household removes out of the verge, the actions there depending are discontinued. 10 Co. 73. a.

Error of a judgment there was in parliament before the st. 5 Ed. 3. 2 and 10 Ed. 3. st. 2. 10 Co. 69. b.

[The plaint, not the capias, is the commencement of the suit in the marshalsea court. Dougl. 61.]

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(G) THE COURT OF GREEN-CLOTH.

So, by the common law, a court is held before the lord steward, treasurer of the household, comptroller, master, cofferer, two clerks comptrollers, who sit at a table with a green cloth *in domo comput. hospitii regis.* 4 Inst. 131.

And they have jurisdiction to take an account of all the expences of the king's household. Ibid.

To make provision for the household, and payment for such provision. 4 Inst. 131.

For the good government of the servants of the household, who are paid, by the lord chamberlain those above stairs, by the cofferer those below. Ibid.

(H) THE COURT OF THE STEWARD OF THE KING'S HOUSEHOLD.

So, by the st. 3 H. 7. 14. the steward, treasurer, and comptroller of king's house, or one of them, may inquire by twelve of the cheque-roll of the household, if any servant of the cheque-roll, under a lord, make any confederacies, compassings, &c. with any, to destroy the king, or any lord of the realm, or any other sworn of the king's council, or the steward, treasurer, or comptroller of the household, and if found, he may be put to answer. And they, or two of them, may hear and determine same offence (which shall be felony) by twelve other of the household, against whom no challenge but for malice. And if the defendants be found guilty by confession or otherwise, they shall have judgment as felons attain by the common law.

So, by the st. 33 H. 8. 12. all treasons, misprisions, murders, manslaughter, bloodsheds, &c. in any palaces or houses of the king, or other house where he resides, shall be inquired, tried, &c. before the lord great master or lord steward, and in his absence, before the treasurer and comptroller, and the steward of the marshalsea, &c. or two of them, whereof the said steward of the marshalsea to be one, without further commission.

[*]And though the king be removed from the palace, where the offence was done before the inquest or trial, it shall be inquired of, tried, &c. before the king's said ministers, or two of them, by his servants of the cheque-roll at the palace, &c. where the king is residing.

And all inquisitions by the coroner of the household shall be returned before them.

And they may issue a precept to the clerks comptrollers, clerks of the cheque, and clerks marshal, to return twenty-four of the yeomen officers of the cheque roll, of whom they may appoint any number more than twelve to inquire of such treasons, misprisions, &c.

So, there is a commission usually granted to officers within the verge to be justices of the peace, and oyer and terminer, for riots, and other offences there. Mod. Ca. 76.

(I) THE PORTMOTE COURT.

The portmote is a court held in a port, or haven of the kingdom. 4 Inst. 148.

THE COURT OF HIGH COMMISSION is taken away by the st. 16 Car. 1. 11.
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(K) THE COURT OF STAR-CHAMBER.

An antient court was holden *coram rege & concilio suo in camera*, which was the court of star-chamber. 4 Inst. 60. 2 Rush. 472.

And therefore, it was not erected by the st. 3 H. 7. 1. but that act affirmed the jurisdiction of the court, and was directory to its proceedings in several particulars. 4 Inst. 62.

The jurisdiction of the court extended to the examination and punishment of oppressions, and other exorbitant crimes of great men, bribery, extortion, maintenance, embracery, forgery, perjury, spreading of false rumours, libels, riots, routs, unlawful assemblies, misdemeanors in sheriffs or bailiffs, frauds, duels, challenges, and other extraordinary offences, pursuant to the laws and customs of the realm. 4 Inst. 63.

And the proceeding was by information or bill, examination of parties upon interrogatories and witnesses. Ibid.

The informations, bills, answers, replications, and decrees were in English, ingrossed in parchment, and filed. Ibid.

The process was by subpœna, attachment, commission of rebellion, &c. all under the great seal. 4 Inst. 66.

But the court had no jurisdiction, except for things which were contrary to the common law, or a statute. 4 Inst. 63.

Nor, for an offence which touched the life or member of a man. 4 Inst. 66.

Nor, for matters of an ordinary nature, which belonged to the courts of common law. 4 Inst. 63.

And now by the st. 16 Car. 10. this court, and all the jurisdiction exercised therein, are dissolved, and taken away.

THE COURT OF REQUESTS is taken away by statute. Vide the st. 16 Car. 1. 10. Vide 4 Inst. 97.

[*]THE COURT OF FIRST-FRUITS AND TENTHS is taken away by the stat. 1 Mary 10. 4 Inst. 120.

THE COURT OF AUGMENTATIONS is taken away by the st. 1 Mary, 10. 4 Inst. 122.

(L) THE COURT OF STANNARIES.

(L 1.) In what cases it has jurisdiction.

By charters, one to the tinnors of Cornwall, and the other to the tinnors of Devon, made 10 Ap. 33 Reg. Ed. 1. and confirmed by charter 8 Ric. 2. the king grants *quod omnes stannatores dum operantur, &c. sint quieti de placitis nativorum & omnibus placitis & querelis curiam nostram spectan., &c. ita quod non respondeant coram aliquibus justiciariis, &c. de aliquo placito infra stannarias prædictas emergent., exceptis placitis terræ, vitæ, & membrorum.* Pl. Com. 327. b. 4 Inst. 232. Stat. 16 Car. 1. 15. Vide Abatement, (D 7.) Waife, (H 2.)

Et quod custos noster vel ejus locum tenens teneat omnia placita inter stannatores prædictos & inter ipsos & alios de omnibus transgressionibus, querelis & contractibus infra stannarias illas emergent., &c. Pl. Com. 327. b.

By st. 50 Ed. 3. and by his charter 6 July, 50 Ed. 3. upon complaint of grievances by colour of the same charters, restraint was put to such grie-

vances, *salvis libertatibus & privilegiis per chart. prædict. concessis.* 4 Inst. 233.

And therefore, the warden of the stannaries may hold a court for redress of all trespasses, complaints, and contracts between the tinner working within the stannaries, &c. and between them and others.

And this privilege extends to all blowers, labourers, and workers without fraud in or about the stannaries in Cornwall and Devon, during the time they work there. R. by all the J. 4 Jac. 4 Inst. 231.

So, the court of the stannaries shall have jurisdiction in all matters which concern or depend upon the stannaries. R. 4 Inst. 231.

So, in all transitory actions between tinner and tinner, though the cause be collateral, and does not relate to the stannaries. Ibid.

So, it may be in the stannaries, though the cause arises out of the stannaries, where the defendant lives within the jurisdiction. Ibid.

So, between a tinner and a foreigner, if the defendant does not plead to the jurisdiction, and it does not appear upon the proceedings to be out of the jurisdiction. Ibid.

(L 2.) In what not.

But by the st. 50 Ed. 3. the court of stannaries has jurisdiction only *de operariis laborantibus in stannariis illis, & non de aliis, aut alibi laborantibus.* 4 Inst. 233.

Though he be master to the labourers within the stannaries, or his other servants. Semb. 4 Inst. 233.]

So, by the st. 16 Car. 1. 15. in a vill only, where some tin-work is in work, and shall be in working.

So, the court of stannaries has no jurisdiction in any local action, which arises out of the stannaries; for pleas of land, life, or member, are excepted out of the charter, and therefore there must be justice elsewhere. R. 4 Inst. 231.

[*]Nor in a personal action, which arises out of the stannaries, if it be between a tinner and another, and the defendant will plead to the jurisdiction, or it appears upon the proceedings to be out of the jurisdiction. Ibid.

So, if the cause of action, between a tinner and a tinner, arises out of the stannaries, it may be brought elsewhere if the plaintiff will. 2 Inst. 231.

If the plaintiff sues in the court of the stannaries, where the matter arises out of the jurisdiction, the defendant may tender a plea to the jurisdiction upon his oath; and if it be refused, he shall have a prohibition. Ibid.

And he has privilege, that he shall not be arrested in any place when he goes to make his oath, *eundo, redeundo, aut morando.* Ibid.

So, by the st. 16 Car. 1. 15. the defendant shall be discharged, if he tender an oath, that he is not, nor was a tinner, when the suit commenced, unless the plaintiff make oath that he is a working tinner without fraud, and that his suit arose within the stannaries, or concerns tin or tin-works.

So, if it appears, by the plaintiff's own shewing, that the cause of action arises out of the jurisdiction, the proceeding there shall be void, though the defendant did not plead to the jurisdiction. Ibid.

Or, if it appears by the condition of an obligation, that a thing was to be done out of the jurisdiction. Ibid.

And in such case, if execution be executed, trespass or false imprisonment lies. Semb. 4 Inst. 231.

So, by the st. 16 Car. 1. 15. an action lies, if any not a tinner, &c. sue there, in which the plaintiff shall recover 10*l.* and his damages and costs.

(L 3.) How the proceeding shall be.

The court of stannaries is held *coram custode stannariæ*, &c. 4 Inst. 229.

And ought to be guided by special laws, allowed by custom or prescription. Ibid.

So, a demurrer there ought to be only for matter of substance, and not for form. R. 4 Inst. 231.

So, error does not lie upon a judgment given there. 4 Inst. 229. 1 Rol. 745. l. 20.

Nor, a writ of false judgment. R. 4 Inst. 230.

Neither can it be examined in B. R., chancery, or other court. R. 7 Eliz. 4 Inst. 230.

But an appeal lies, by usage, to the steward of the stannaries, and from him to the under-warden, and from him to the warden of the stannaries, and from him to the prince and his council. R. 4 Inst. 230. 1 Rol. 745. l. 20.

And, if there be no prince, to the king in council. 1 Rol. 745. l. 20.

(M) THE COURTS OF THE UNIVERSITIES.

By the st. 13 Eliz. 29. the universities of Oxford and Cambridge are severally incorporated; and all former letters patent to them severally granted, and all manors, &c. franchises, privileges, &c. are confirmed. 4 Inst. 227. Vide University.

[*]And therefore, by charter 14 H. 8. now confirmed by the same st. 13 El. the university of Oxford may hold plea, before the vice-chancellor, in all things personal, *secundum legem terræ, aut morem universitatis*. Lit. 10.

And in trespass by any person, where a scholar is party. 1 Sal. 343.

Before the 14 H. 8. the university of Oxford had a court-leet. Ibid.

But an university, in their court, cannot hold plea for the penalty of a statute; and a recovery there is no bar in an action at common law. Skin. 665.

[In the chancellor of Oxford's court, the plaintiff, to obtain a warrant to arrest defendant, must swear he has a personal action against him, and that he believes he will run away; to swear of and upon the truth of the premises, and that he suspects he will run away, is not sufficient. M. 8 G. 2. Str. 993. B. R. H. 62.]

[The vice-chancellor's court in the university of Cambridge, has cognizance over the offence of publishing therein a pamphlet against the established religion. 6 T. R. 89.]

(N 1.) THE ECCLESIASTICAL COURTS.

As to the original of the ecclesiastical jurisdiction, Vide Prerogative, (D 9, &c.)

As to the court of convocation, vide Convocation.

The court of high commission is now taken away by the st. 16 Car. 1. 11. —Vide for this, Prerogative, (D 17.)

The courts of the archbishop are, 1. The prerogative court. 2. The court of arches. 3. The court of audience. 4. The court of faculties.

[No proceedings in the ecclesiastical courts of this kingdom are records, but only evidence of sentences in their courts, and the officers should not take upon them to entitle them *recorda dom*. M. 1744. 3 Atkyns, 197.]

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(N 2.) The prerogative court.

The prerogative court is the court where the archbishop grants administration, or makes probate of the testaments of all having *bona notabilia* within his province. 4 Inst. 355. Vide Administrator, (B 3, &c.)

Or, repeals a probate, or administration, granted by surprise.

A sentence by an ecclesiastical judge, in a spiritual cause, shall be allowed as consonant to the ecclesiastical law, by the temporal judges. 2 Rol. 219. l. 20. 5 Co. 7. Caudrey's Case of the King's Ecclesiastical Law.

And therefore a certificate, &c. of such sentence need not mention the cause of it; as, if it certifies a deprivation of an ecclesiastical person, it need not express the cause of the deprivation. 2 Rol. 219. l. 30.

So, it is sufficient if a sentence be found in a special verdict, without mentioning the cause. Ibid.

So, a process in the name, and under the seal of a bishop, &c. shall be good. R. 12 Co. 7. Vide Prerogative, (D 17.)

(N 3.) The arches.

The court of arches has ordinary jurisdiction in Bow and twelve other parishes in London, for ecclesiastical causes there arising. 4 Inst. 337.

[*]So, it has jurisdiction upon appeal, in all causes within the province of Canterbury. Ibid.

The dean of the arches is the judge in this court. Ibid.

And may hear causes, at the instance of parties, or *ex officio*.

And act as deputy to the archbishop, and by his authority. Skin. 290.

But a suit ought not to be in the arches, where the archbishop himself is a party; for though another sits as judge there, the archbishop may sit there if he pleases. 2 Sho, 146.

Though the archbishop sues only as a trustee; for he ought to have a commission of delegates originally. Ibid.

So, an appeal does not lie from the dean to the archbishop. Skin. 290.

(N 4.) The audience.

The court of audience is held in the archbishop's palace, before his vicar-general in spirituals.

The jurisdiction does not relate to causes between party and party, but to matters *pro forma*. 4 Inst. 337.

As, the consecration and confirmation of bishops elected. Ibid.

Admission and institution to benefices. Ibid.

Dispensations. Ibid.

The grant or appointment of a guardian of the spiritualties *sede vacante*. Ibid.

And by himself or his commissary, he may exercise all ecclesiastical jurisdiction in *qualibet diocesi, sede vacante*; and make institutions and visitations in such diocese, as the bishop himself when the see is full.

(N 5.) The court of faculties.

So, the archbishop has a court of faculties, which does not hold plea in suits, but there the archbishop, or his official, master of the faculties, grants dispensations in cases allowed by the st. 25 H. 8. 21. viz. for any such matter whereof dispensations, &c. were accustomed to be by authority of the see of Rome.

By the st. 25 H. 8. 21. the archbishop by himself, commissary, or deputy may grant, by instrument under his name and seal, all licences, dispensations, faculties, compositions, delegacies, rescripts, or other writing, for any such cause whereof such licences, &c. were accustomed to be had at the see of Rome, &c.

The archbishop may constitute a clerk to write and register such licences, &c.

And this court has authority to grant such dispensations and faculties, by the master of the faculties. 4 Inst. 337.

As a faculty to be a doctor, bachelor of arts, &c. Semb. 2 Mod. Ca. 364.

And if it be subscribed by a deputy, and not by the chief clerk of the faculties, and afterwards registered and inrolled, it is sufficient. 2 Mod. Ca. 364.

And this court may grant a dispensation for marriage, plurality, accepting a benefice where his father was incumbent, &c. 4 Inst. 337.

By the st. 5 El. 5. the archbishop, bishop, &c. are allowed to grant licence to eat flesh in Lent, &c. Vide 4 Inst. 337.

[*](N 6.) The consistory court.

Every bishop has his consistory court, held before his chancellor or his commissary, for all ecclesiastical causes within his diocese. 4 Inst. 338.

The consistory court seems to be erected after the time of H. 1. but upon the ground of a charter by W. 1. to the bishop of Lincoln. 4 Inst. 259, 260. Cod. J. Eccl. 1009. Seld. of Tithes, ch. 14. s. 1.

(N 7.) The manner of proceeding.

Omnes causæ in foro ecclesiastico movent ex officio, vel ad instantiam partis.

Causæ ex officio sunt pro crimine commissio, vel suspecto, et sunt ex officio mero, vel promoto.

Causæ ex mero officio are, where the judge proceeds against the criminal upon request, or accusation, or detection by another.

Ex officio promoto, where another brings the accusation, and prosecutes the cause.

(N 8.) Censures and appeals.

As to ecclesiastical censures. Vide Prerogative, (D 12.)

As to appeals, vide Prerogative, (D 13, &c.)

(N 9.) The court of the archdeacon.

So, by prescription, or composition, the archdeacon has a court, in what place he pleases, for causes ecclesiastical within his archdeaconry. 4 Inst. 339. 2 Rol. 150. 37 H. 6. 28. a. Vide ecclesiastical Persons, (C 5.)

And shall make a register of his court. 2 Vent. 269.

The courts of law take notice of his jurisdiction. 2 Rol. 150. 2 Vent. 269.

A libel was exhibited in the consistorial court, for disturbing the plaintiff's interest, right, and property in a pew claimed as appurtenant to a messuage, upon which judgment was given, that the pew belonged to the plaintiff; the sentence was reserved by the court of arches, who also admonished the defendant not to sit in the pew. Held, that these sentences were not conclusive of the plaintiff's right in an action by him for disturbance. 3 T. R. 639.

Vide more concerning ecclesiastical courts in Dismes, (M 1, &c.) Prohibition.

(O) THE COURTS OF LONDON.

(O 1.) The hustings.

In London there are, the courts of hustings, of the mayor, of the sheriffs, of the chamberlain, of aldermen, of common council, the wardmote, court of conservancy, and court of conscience.

The court of hustings is the most ancient and eminent court within London. 4 Inst. 247. 2 Inst. 322.

And is held before the mayor and sheriffs, of all pleas, real, mixt, and personal. 4 Inst. 247.

By custom, the city of London shall hold plea of lands within the city by writ of right patent, or by other writs of the king. F. N. B. 6, 7.

[*]And therefore, when the suit is by right patent, he shall not sue in nature of such a writ as he pleases at common law, as he shall do when he sues a writ of right close in ancient demesne. F. N. B. 7. A.

By charters of H. 1. & H. 3. the hustings shall be held once a week. 2 Inst. 327. (Vide Priv. Lond. 4. 10.)

And therefore, the hustings is held in one week for pleas of land, or actions real, and the next for common pleas; for they are distinct. (Vide Priv. Lond. 160.)

After delivery of the writ, three summonses go against the tenant, returnable at the next hustings, and an essoign upon each at the next hustings; and if he does not appear after the third summons and third essoign, process shall be by *grand* or *petit cape* as at the common law. (Vide Priv. Lond. 161.)

If the tenant appears, the demandant counts, and proceeds as at common law. (Vide Priv. Lond. 161.)

And, by custom, the tenant shall have an essoign after every appearance, and after the view. Ibid.

In the hustings for common pleas, the plaintiff shall sue a writ *ex gravi querela*, a writ of dower *unde nihil habet*, a writ of gavalet, of waste, of partition, *quid juris clamat*, &c. 2 Inst. 299. Vide Waste, (B 1, 2.) (Vide Priv. Lond. 164, &c.)

So, a writ of error upon a judgment in the sheriff's court. Vide post, (O 4.) (Vide Priv. Lond. 164. 168.)

But, by the custom of London, judgment of outlawry in the hustings in London shall be given by the recorder, not by the mayor, though he be coroner, or his deputy, as in other counties. 2 Inst. 427.

(O 2.) If there be a foreign vouchee.

If the defendant in the hustings had vouched in a foreign county by the common law, the plea was put without day, and the record ought to be removed to C. B. 2 Inst. 324. Vide Voucher, (H).

But now by the st. Gloc. 12. there shall be a summons *ad warrantizandum* returnable in C. B., and a writ to the mayor and bailiffs, to surcease until the plea be determined in C. B. and then the warrantor shall answer to the chief plea, and if the demandant recovers, the tenant shall have a writ from C. B. to the mayor to extend the land, and to return the extent into C. B. and afterwards shall have a writ to the sheriff of the county

where the vouchee was summoned, to have of the land of the warrantor to the value. 2 Inst. 324. Vide Voucher, (H).

(O 3.) The mayor's court.

The mayor's court is a court of record, held before the mayor and aldermen, for all actions arising within the liberties of London, in which the recorder is judge; but the mayor and aldermen may join with him when they please. (Vide Priv. Lond. 186.)

So, in this court, all matters of equity within London may be determined upon bill and answer, upon which the recorder also is judge. Vide post, (O 5.) (Vide Priv. Lond. 256.)

(O 4.) The sheriff's courts.

Each sheriff of London has a court of record held before him. (Vide Priv. Lond. 264.)

[*]And upon a plaint entered there, any serjeant of mace may arrest the defendant upon a precept *ore tenus*, till he finds bail. (Vide Priv. Lond. 271, 272. 277.)

Though the entry be only in the porter's book, before an entry in court. (Vide Priv. Lond. 277.)

And though bail be tendered to the sheriff, the serjeant is not bound to discharge him till notice from the sheriff.

If error be of a judgment in the sheriff's court, it shall be before the mayor and sheriffs in the hustings. 4 Inst. 248. (Vide Priv. Lond. 164. 168.)

[To prove the discontinuance of a suit in the sheriffs' court in London, the entry in the minute-book is evidence. 14 East, 216.]

(O 5.) The court of equity in London.

By the custom of London, if a man be impleaded before the sheriffs, upon a suggestion the mayor may bring the parties and record before him, and examine them upon their pleas; and if he finds that the plaintiff is satisfied, order that the plaintiff be barred. 4 Inst. 248. (Vide Priv. Lond. 275.)

But by the custom, the mayor cannot examine the parties after judgment. 4 Inst. 248. R. Godb. 127.

(Vide Priv. Lond. 256. 275. 398, &c.) Vide ante, (O 3.)

(O 6.) The ward-mote.

The court of ward-mote is held for every ward in the city: for each ward is of the nature of an hundred in a county. 4 Inst. 249. (Vide Priv. Lond. 355.)

By inquisition of twelve men, the ward-mote inquires of defaults in paving the streets, &c. 4 Inst. 249.

(O 7.) Folk-mote.

The court of folk-mote or hall-mote is *conventus in aula publica* of each company in the city. 4 Inst. 249.

(Vide Priv. Lond. 408.)

(O 8.) The Tower-court.

By prescription, a court is held within the tower for debt and other personal actions. 4 Inst. 251. (Vide Priv. Lond. 409.)

So, by charter of H. 1. the citizens of London may place whom they [*342]

will of themselves, for keeping the pleas of the crown, and no other shall be justices over the men of London.

(O 9.) The court of requests.

[By st. 14 G. 2. c. 10. all debts under 40s. may be recovered in the court of requests thereby established; concerning which various regulations are laid down.]

[Vide 39 & 40 G. 3.]

[It seems, that one residing out of London, but carrying on his trade within it, is not an inhabitant within the meaning of the London court of requests act. 14 Geo. 2. c. 10. 5 T. R. 529.]

[And the statute only applies where as well the plaintiff, though a citizen or freeman, as the defendant, is inhabiting within the city. 5 T. R. 535.]

[*]It does not apply to persons merely on account of their seeking a livelihood within the city, unless they reside there, or do it in some open way, or seek their livelihood there substantially. 1 Smith, 334.]

[And semble, that in order to keep a shed or stand within the meaning of the 39 & 40 G. 3., the party ought to have a permanent and exclusive interest and occupation of the shed. 8 East, 336.]

[Query, whether a clerk by attending a solicitor's office in the city during the day, but lodging elsewhere, seeks a livelihood within the city? 13 East, 161.]

[A defendant is not privileged to be sued in the London court of requests, unless he seeks his livelihood wholly within the city. 16 East, 147.]

[And that the court may have jurisdiction, as well the plaintiff as the defendant must be resident or seeking his livelihood in London. 2 H. B. 220.]

[The term, "seeking a livelihood," means seeking it by some means which are local and fixed to a certain spot, at which the defendant may be found and served with a summons. 2 Taunt. 196.]

[A person rents a counting-house in the city of London jointly with another person, and receives orders there for his business. Held, that he is within the jurisdiction of the court of requests for the city of London, though he sleep and reside in Southwark. 1 Mars. 269. 5 Taunt. 648.]

[An action for use and occupation does not lie in the court of conscience for the city of London, or in that for the Tower hamlets. Dougl. 244.]

[And the statute only applies where the demand is liquidated; not therefore where it sounds in damages for the breach of a special agreement. 5 T. R. 529.]

[A contract for the retention of tithes by a tenant, is within its jurisdiction. 5 East, 194. 1 Smith, 396.]

[But *assumpsit* for the single value of tithes is not a matter "concerning or property belonging to the ecclesiastical court," under the exception in sect. 11. of 39 & 40 Geo. 3. c. 104. 1 Smith, 396. 5 East, 194.]

[Right of the chamberlain of London to sue a stock-broker in the London court of requests for the annual duty, under 6 Ann. c. 16. s. 4. notwithstanding a bond given by the broker to the corporation. 6 East, 292.]

[If the original debt has been reduced below the sum of 5*l.* by part payments on account, before the commencement of the action, the defendant, in case he were amenable to the jurisdiction of the London or the Southwark court of requests, will be entitled to enter a suggestion on the roll. 8 East, 347. *Id.* 28. 1 B. & P. 223.]

[A demand reduced below 5*l.* by a balance struck before action brought is within the 39 & 40 Geo. 3. c. 104. 1 M. & S. 393.]

[Debt upon a judgment may be maintained in the London court of requests, where the defendant is amenable to that jurisdiction. 2 B. & P. 588.]

[If the plaintiff recovers less than 5*l.* in an action brought in London, where the original debt has been reduced by payments, and not by set-off, the defendant will be permitted, on motion, to enter a suggestion on the roll, under the London court of conscience act, in order to have his costs allowed. 2 Price, 19.]

[*][The provision as to costs in s. 12. of 39 & 40 Geo. 3. c. 104. took effect from the 30th September 1800, not from the passing of the act. 2 East, 135.]

[The 39 & 40 Geo. 3. c. 104. s. 12. includes the case of a judgment by default, and an assessment of damages below 5*l.* 8 East, 239. 2 B. & P. 588.]

[The C. B. refused to permit a defendant, who at the commencement of the action kept a warehouse within the city of London, and was of consequence liable to be sued in the court of requests there, to enter a suggestion upon the roll to exempt him from costs under the 12th sect. of 39 & 40 Geo. 3. c. 104., although the plaintiff had recovered a verdict for less than 5*l.*, and notwithstanding also the original debt was below that sum, it appearing that the defendant had, after the bringing of the action, told the plaintiff that he did not keep the warehouse in question, and also that the plaintiff had made inquiries in the neighbourhood of the warehouse, without obtaining any intelligence respecting the defendant. 1 N. R. 153.]

[Where the plaintiff recovers less than 40*s.*, though from having commenced his action prematurely, the defendant is entitled to a suggestion for costs under the London court of requests act. 2 Taunt. 169.]

[Though an affidavit for entering a suggestion for costs under the London court of requests act, must state that the defendant was resident in London when the cause of action arose; it need not add that he was liable to be summoned to that court, since, unlike the Middlesex act, 23 Geo. 2. c. 19., this has not those words. 2 Taunt. 169.]

[Where the plaintiff recovers less than 5*l.*, it is no objection to entering a suggestion on the roll to that effect, under 39 & 40 Geo. 3. c. 104., that the plaintiff believed he had a cause of action for more than that sum. 2 Mars. 145. 6 Taunt. 452.]

[Courts of conscience have incidental jurisdiction over a question of bankruptcy. 1 B. & P. 11.]

THE COURT OF ALDERMEN. Vide LONDON (D).—Vide 4 Inst. 248. Vide Priv. Lond. 353.

THE COURT OF THE CHAMBERLAIN, AND OF THE CHAMBERLAIN AND ORPHANS. Vide GUARDIAN, (G 1, &c.)—LONDON, (I—N 2.)—Vide 4 Inst. 248, 250. Vide Priv. Lond. 279, &c. 302, &c.

THE COURT OF COMMON COUNCIL. Vide LONDON, (F).—Vide 4 Inst. 249. Vide Priv. Lond. 350, &c.

THE COURT OF CONSERVANCY. Vide LONDON, (B).—Vide 4 Inst. 250. Vide Priv. Lond. 364, &c.

THE COURT OF THE CORONER. Vide OFFICER, (G 5, &c.)—Vide 4 Inst. 250. Vide Priv. Lond. 408.

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THE COURT OF ESCHEATOR. Vide ESCHEAT, (C.)—Vide 4 Inst. 250.
Vide Priv. Lond. 408.

THE COURT OF WATERMEN. Vide Priv. Lond. 387, &c.

THE COURT OF ST. MARTIN'S-LE-GRAND. Vide Priv. Lond. 409. Vide
DISMES, (M 6, 7.)

[*](P) COURTS IN OTHER CITIES, BOROUGHES, &c.

(P 1.) Grant *tenere placita*.

So, by grant, or prescription, every other city, or borough, may have courts for matters within their precincts.

In every case, where power is given to any, to hear and determine, they have judicial authority, and act as judges. 1 Sal. 200.

And if authority be given to fine and imprison, it shall be a court of record. R. 1 Sal. 200. 396.

A grant *tenere placita*, gives jurisdiction, but not exclusive of other courts. Hard. 509. If there be no negative words. Pal. 456.

And upon such a grant, the grantee may make a judge; but when made, he is the king's justice. 20 H. 7. 6. a.

But a court cannot hold plea of freehold, upon a plaint, without writ; though a custom for it be alleged. R. 2 Lev. 98. 123.

So, a court, which does not proceed according to the common law, cannot be established by the king's charter, without an act of parliament, or prescription. 2 Vent. 33, 4. Vide Chancery, (A 3.)—Prerogative, (D 28.)

[The stat. 29 Geo. 2. c. 37. does not give power to the courts baron of Sheffield and Ecclesall, to hold suit against persons residing within the jurisdiction of those courts in causes arising without, E. 35 Geo. 3. 6 T. R. 242.]

(P 2.) Conusance of pleas.

So, the king may grant conusance of pleas; by which the grantee shall have conusance of all pleas commenced in other courts out of such precinct. Hard. 509. Pal. 456. Vide University.

And a grant of conusance of all actions, is the same as of all pleas. 1 Rol. 489. l. 52.

So, the grant shall be allowed, though the action be laid in London, or in another county: for it shall be commenced *de novo*. R. Hard. 509.

Though the suit be by *quo minus*, for this does not exclude conusance, where there are the words, *licet tangat nos*. R. Hard. 509.

So, an antient grant *de curia regali*, or *omni regia potestate*, is sufficient, if conusance upon it has been allowed. 1 Rol. 491. l. 10.

So, such antient grant is sufficient, though no judge be named, where the bailiff of the grantee has always used conusance. 1 Rol. 491. l. 10. 15. 27.

A grant of conusance of all pleas extends to an assise, &c. if conusance of it has been used upon an antient grant. 1 Rol. 490. l. 20. 23. 14 H. 6. 12. a.

A grant of conusance *in quibuscunque curiis*, extends to B. R. and C. B. 1 Rol. 490. l. 2. Semb. Pal. 456.—So, to the chancery, and exchequer. R. Hard. 509.

A grant where a scholar or *persona privilegiata* is sued, extends where the college or corporation is sued. R. 1 Mod. 164,

And shall be allowed in the exchequer, or B. R. though the suit there be by bill, which imports privilege. R. 6 H. 7. 9. b.

[*](P 3.) When it shall not be allowed.

But conusance cannot be claimed by prescription. Co. L. 114. 1 Sal. 183.

And a grant of it will be bad, generally, if it be not said before what judge. 1 Rol. 491. l. 5. 20.

Unless where it is implied, before whom : as, if a grant be of conusance within his court ; for the judge of the court shall have it. 1 Rol. 419. l. 17.

[So, a grant of conusance to proceed in any other manner but by the common law is not good, but by an act of parliament. Hard. 509. 2 Wils. 408.]

So, a grant before the bailiff, steward, &c. of the grantee is void, where he has no such officer. 1 Rol. 491. l. 25. 1 H. 4. 5. a.

So, a grant of conusance in all pleas, does not extend to felony or appeal. 1 Rol. 489. l. 55.

Nor, to an assise, unless it be named ; for it is a plaint. 1 Rol. 490. l. 15. 20. 14 H. 6. 12. a.

So, a grant of conusance in covenant does not extend to a fine upon a writ of covenant. 1 Rol. 490. l. 50.

So, conusance of pleas *coram quibuscunque justiciariis* does not extend to the justices of B. R. or C. B. if they be not named. 1 Rol. 490. l. 5.

So, conusance of pleas shall not be allowed, where the inferior court cannot do right ; as, in replevin : for it cannot grant a re-summons, or second deliverance. 2 Inst. 140. 1 Rol. 489. l. 30. F. g. 153. 295.

Or, a *quare impedit* : for the inferior court cannot write to the bishop. Co. L. 134. b.

Nor, where an interpleader is necessary : for it cannot allow it. 1 Rol. 493. l. 20.

Nor in a fine, or *scire facias* upon it. 1 Rol. 490. l. 13. 492. l. 40.

Nor, in an action founded upon a statute made since the conusance granted. 1 Rol. 490. l. 30.

Nor, in an attain ; for by the st. 23 H. 8. 3. it shall be brought in B. R. or C. B. Co. L. 294. b. Dy. 202. b.

So, it shall not be allowed, if the grantee be party. 1 Rol. 491. H. 492. l. 15. Semb. cont. Dy. 157. a.

Though the grant be, *licet ipse sit pars*. 1 Rol. 492. l. 20. 30.

Otherwise, where the plea is held before the steward of the grantee. 1 Rol. 492. l. 5. 25. Dy. 157. a.

So, it shall not be allowed in a transitory action alleged out of the jurisdiction. R. 1 Sid. 103.

Or, where the defendant is a foreigner ; or where one of the defendants is so, if he cannot be severed. 1 Rol. 493. l. 50. 494. l. 2. 5.

Or, pleads privilege : as, an attorney, &c. R. 1 Rol. 489. C. Dy. 287. a. in marg. R. Lit. 304.

[*Quære*. When an attorney is plaintiff, whether the universities are entitled to conusance ? C. P. M. 14 Geo. 2. Willes, 233. Barnes, 346. Pr. Reg. 696. S. C.]

Or, is *in custodia mar*. Semb. 6 H. 7. 9. b.

[*]If he be sued as a trustee, or for other matter of equity in chancery, or the exchequer. R. Hard. 189. R. 2 Vent. 362. Vide Chancery (3 X.)

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When and how demanded.

Conusance ought to be demanded by the lord, and not pleaded to the jurisdiction. Semb. 1 Lev. 89. Bro. Jurisdiction, 92.

And it shall be demanded the first day, at the return of the original, where the place appears by the writ; as, in trespass *quare clausum fregit*, &c. 1 Rol. 494. M.

In debt, &c. if the franchise be a county by itself. 1 Rol. 495. l. 10. R. 3 H. 6. 30. b.

If the place does not appear by the writ, as generally in debt, detinue, &c. it ought to be at the day of the count. 3 H. 6. 31. a. 1 Rol. 494. l. 55. 495. l. 5. R. 9 H. 7. 10. b. 16 H. 7. 16.

[But a demand comes too late after plea pleaded, and replication tendering issue. Barnes, 346.]

[So, after an imparlance, or an inquest awarded by default. 1 Rol. 489. A. 492. l. 50. 493. l. 10. 494. l. 45. 495. l. 17. 6 H. 7. 10. a. R. 1 Sid. 103. 1 Lev. 89. Sho. 352. C. P. M. 14 Geo. 2. Willes, 233. Barnes, 346. Pr. Reg. 696. S. C.]

[And if the declaration be delivered after Hilary term, intituled as of Hilary term, it may be claimed the first day of Easter, notwithstanding the imparlance; for an imparlance is but a fiction, and one fiction may be set against another by entering the claim on a roll of Hilary term. 2 Wils. 411.]

It ought to be demanded by the lord himself, or his attorney. 1 Sal. 183. 6 H. 7. 10. a.

So, by the chancellor of the university, the steward of Ely, &c. Dy. 157. a. 1 Mod. 163.

By the vice-chancellor, or his attorney. R. Hard. 510.

And he ought to shew the charter itself, or an allowance in eyre. 3 H. 6. 30. b. 1 Sid. 103. 1 Lev. 89. 1 Sal. 183. Pal. 456.

And if it be an attorney, his letter of attorney in Latin. 2 Sid. 103. Sho. 352. 1 Sal. 183.

And he ought to continue his demand at every return of process. 1 Rol. 495. l. 31.

And, it is sufficient to shew usage in a single instance. 1 Sal. 183.

[The claim must be entered on record, and state every thing that is necessary to take away the jurisdiction of the court. 2 Wils. 410.]

[The whole proceedings in the cause up to the time of making the claim, ought to be entered on the same roll with the claim. Then the claim thus: and hereupon comes George Henry, earl of Litchfield, chancellor of the university of Oxford, by C. D. his attorney, to demand, claim, prosecute, and defend his liberties thereof, that is to say, to have the conusance of the plea aforesaid. 2 Wils. 410.]

[Then the charter on which the claim is founded must be fully set forth, and also the act of parliament, if there be a private one, confirming the charter.]

[Then, if the claim is only by charter, that it has been allowed before by the king's writ, or by the superior courts. 2 Wils. 410. 412.]

[But, if it be by act of parliament, it is not necessary to shew that it has been allowed. 2 Wils. 412.]

[*] [Then the conclusion in this form; and the aforesaid chancellor demands his liberties and privileges aforesaid, according to the form and effect of the letters patent aforesaid, and the confirmation, aforesaid, in this plea

between the parties aforesaid, in the court of the lord the king now depending, to be allowed him. 2 Wils. 410.]

[If the claim be by charter only, then add; as heretofore hath been allowed. Id. ibid.]

[If the claim be by an university, there must be a certificate from the chancellor that the parties are, or at least that the defendant is, of the university. Str. 810.]

[And that the defendant is actually resident at the university. 2 Wils. 312.]

[And there must be an affidavit confirming the chancellor's certificate. Str. 810. 2 Wils. 312. Vide B. R. H. 241.]

Or, at the return of the *capias* or exigent, where the place appears by the writ. 1 Rol. 492. l. 45. 495. l. 12.

Yet, it cannot be allowed, till the writ served, and all the defendants appear. 1 Rol. 495. l. 27. 40 ad 45.

[If the claim be allowed, that does not so absolutely dismiss the cause, as that it can never be brought back again; but the parties have a day given them in the court of the party claiming conusance, and if the inferior court do not do them full and speedy justice, they shall return again to the king's court. 2 Wils. 411.]

[Therefore, after the entry of the allowance of the claim, the further entry on the roll runs thus: *et super hoc. idem attornatus ejusdem, &c. hic in curia præfixit diem partibus prædictis coram, &c. apud T. infra hundredum prædictum die, &c. et dictum est eidem attornato, &c. quod partibus prædictis plena et celeris justitia inde exhibeatur, alioquin redeant, &c.* Id. ibid.]

[And for good cause shewn, the cause may be brought back again, a re-summons awarded, and the parties go on from the period in which the clause was at the allowance of the claim. Id. Ibid.]

[Conusance must be claimed in the first instance, or at the first day. 5 Burr. 2820.]

[Conusance on behalf of the university may be claimed by the vice-chancellor of Oxford, during a vacancy in the office of chancellor. 11 East, 543.]

[An affidavit in support of a claim of conusance by the university of Oxford, in respect of one alleged to be now a common servant of the university, need not state that he is resident therein, or that he is matriculated. 15 East, 634.]

[Claim of conusance by the university of Cambridge allowed, notwithstanding objections to the mode in which it was made and entered on the record. 12 East, 12.]

(P 4.) Incidents to courts.

If the king grants to a borough, &c. power *tenera placita*, it shall have all incidents, though not mentioned in the charter: as, it shall have officers, a serjeant, bailiff, &c. to return juries, execute process, &c. R. 1 Rol. 526. l. 30.

So, if it be erected by act of parliament: and shall have power to continue their process, as incident. R. 1 Sal. 408.

So, it shall have process. Vide post, (P 8.)

[*] But it shall not have power, as incident, to award a writ of inquiry to a bailiff: for it may be executed in court. R. 1 Rol. 526. l. 85.

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(P 5.) Jurisdiction.—In actions real.

The jurisdiction of inferior courts in a city, borough, &c. extends to all actions, real or personal, which by grant or prescription are allowed to them.

A writ of right patent lies for a tenant in fee, directed to the mayor and sheriffs in London, or to bailiffs, &c., commanding them to do right to the demandant against the tenant for such tenements. Reg. 2 b. F. N. B. b. C. D. Vide Droit, (B 1, &c.)

And in this he does not make protestation to sue in the nature of such a writ as he pleases, as in a writ of right close, but must sue such writ as his case requires. F. N. B. 7. A.

And therefore, as right patent lies for tenant in fee, so a special writ lies to the mayor and sheriffs, or to bailiffs, &c. to do justice to the heir in tail, for lands devised, &c. to him. Reg. 244. b. F. N. B. 7. A.

Or, to him in reversion, or in remainder. Reg. 245. a.

So, to tenant in dower. Reg. 170. b. F. N. B. 7. A.

So, since the st. Gloc. 6 Ed. 1. 11. if any one impleaded lose by collusion, to make a termor lose his term. Reg. 179. a. 2 Inst. 323.

So, upon the st. Glo. 13. if a tenant does waste or estrepement. 2 Inst. 328. Reg. 77. b.

So, to make partition. Reg. 76. B. F. N. B. 6. G.

[If a sheriff is empowered by private act of parliament to take inquisition of the value of lands giving notice to the owners, the notice must appear on the inquisition, otherwise the jurisdiction does not appear; and on certiorari all will be quashed. T. 8 G. 3. 4 B. M. 2244.]

(P 6.) Actions personal.

So, in personal actions an inferior court may hold plea by charter, or prescription.

The style of the court.—And the style of the court ought to shew by what authority the court was held. R. 8 Co. 133. a. R. 1 Cro. 489. Mo. 422. Ow. 50. 1 Rol. 795. l. 38. Noy. 35. R. 2 Cro. 184. 493. 532. R. Yel. 46. R. 1 Sid. 311. R. Jon. 451.

So, every officer who justifies under the authority of the court, ought to shew it; as, a steward, bailiff, &c. R. Cro. Car. 46. Adm. Mod. Ca. 72.

[If the style of the court is, according to the custom whereof, &c. it is not necessary to shew that the steward may appoint an under-steward, or that he was appointed in writing. M. 2 G. 2. Ld. Raym. 1543.]

But where the style of the court is not conformable to the usual courts, it shall be aided by intendment, as if, in the style of a court *pedis pulverisati*, it be alleged, that it is held by prescription; it shall not be intended of a court of piepowder, which cannot be by prescription, but of another customary court under that denomination. 1 Sal. 265.

So, if the style alleges the court to be *secundum legem mercatoriam*, where it does not appear to be *curia stapulæ*; it shall be intended of some other court under that denomination. R. 1 Sal. 265. Mod. Ca. 61.

[*](P 7.) The plaint.

In these courts, the plaint is in the nature of an original in C. B. 1 Sal. 266. [1 Leo. 184. 302. B. R. H. 19 Geo. 3. Doug. 61.]

[If the plaint is of a plea of trespass, generally; it is good, without adding with force and arms. M. 2 G. 2. Ld. Raym. 1543.]

(P 8.) The process.

If the king grants conusance of pleas, the grantee shall have power to make process by *petit cape*, process upon voucher, or other process, as incident, though no mention of it in the grant. 1 Rol. 490. l. 45.

And he shall make process by *capias*, where other justices make it. 1 Rol. 495. l. 50.

And, by grand distress, where the case requires. 1 Rol. 495. l. 51.

And if the defendant be convicted, he shall be fined, imprisoned, or amerced, as the case requires. 1 Rol. 495. l. 55.

So, by custom, goods taken upon grand distress, if it be returned *quod nihil habet ulterius*, may be delivered to the plaintiff for his debt, if he recovers, upon security to re-deliver them if he does not obtain judgment. 1 Rol. 564. l. 4.

But a *capias* ought to be after a summons or attachment, not the first process. Yel. 158. R. 2 Cro. 261. [C. P. M. 11 Geo. 2. Willes, 30.]

And if it be, it shall be error, and not aided, as the want of an original by the st. 18 El. R. 2 Cro. 222. 261. Yel. 158.

[But the irregularity of a *capias* issuing for the first process is aided by defendant's appearance. M. 2 G. 2. Ld. Raym. 1543.]

So, a custom, that a *capias* be awarded before summons, will be void. R. 1 Rol. 563. l. 20.

So, a custom, in the *capias* against the principal, to have a clause, if he be not found to take the bail. R. 1 Rol. 563. l. 44.

So, a custom to take the bail in execution upon a return of *non est inventus* upon a *capias* against the principal, without a *scire facias*, is void. R. 1 Rol. 563. l. 35. 45.

So, generally, the process ought to be returnable at a day certain; for *ad proximam curiam* is not sufficient. R. 2 Cro. 314. 2 Bul. 36.

[But where there is a justification under process of an inferior court, it is sufficient that it was returnable *ad proximam curiam*, especially if it appear that the court was held at any time certain, as from three weeks to three weeks. Cowp. 21, 22.]

[And this whether the process be mesne or judicial. Id. ibid.]

[By stat. 19 Geo. 3. c. 70. s. 1. no person shall be held to special bail. upon any process issuing out of any inferior court, for less than 10l.]

(P 9.) The declaration.

By the st. 36 Ed. 3. 15. all pleas in the courts of the king, or others, shall be in Latin. Vide the st. 4 G. 2. 26., and 5 G. 2. 27., that all proceedings in courts of justice are to be in English.

And therefore, in a declaration, if the day or year be in English figures, it is error. R. 1 Sid. 40. 2 Lev. 102.

Otherwise, in numeral letters, which are Latin figures. R. 2 Lev. 102.

Or, if the time be well described by the year of the king, the addition of the A. D. in figures shall be rejected. R. 1 Sal. 195.

So, an usage to write in English does not aid. R. Cro. El. 85. 185.

[*]By the st. 8 El. 2. in courts of London or corporations, where continuances are *de die in diem*, the plaintiff shall declare in three days after appearance, otherwise at the next court, unless time given by special order of court, or pay costs.

A declaration *unde idem Q. per att. suum quod cum*, &c. omitting *dicit*, is error. R. Yel. 103.

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So, if the cause of action does not appear to be within the jurisdiction of the court, it is error; as, if the whole consideration in *assumpsit* does not appear to have been there: as *assumpsit* for wares sold, without saying *ibidem vendit*. 1 Sand. 74. R. 1 Vent. 243. 1 Sid. 87. 1 Lev. 137. R. 2 Jon. 230. 2 Lev. 87.

[That the defendant was indebted, and promised to pay within the jurisdiction, is not sufficient. 2 Wils. 16. 1 Term Rep. 151.]

[It must also be shewn that the goods were sold and delivered there. 2 Wils. 26.]

[Or, that the money was had and received. 1 Term Rep. 151.

For money lent, without saying *ibidem mutuat*. 1 Vent. 72.

For nursing, without saying *ibidem nutrit*. Ray. 75. 1 Lev. 96.

So, if the action be for a close called B., without saying that the close lies within the jurisdiction.

Or, for trespass done there. Noy, 129.

[And where one count is not laid within the jurisdiction, and the damages are given generally, it is fatal on a writ of error, though there be another good count. 1 Term Rep. 151.

[And the stat. of jeofails will not help it. Id. ibid.]

So, if an *assumpsit* be for fees as a solicitor in chancery; for the chancery is not within the jurisdiction. R. 1 Vent. 23.

Or, *quod non molestaret* the jesuits, without saying, that the jesuits lived within the jurisdiction. R. 1 Sid. 105.

Quod sursum redderet an obligation, without saying, that it was within the jurisdiction. 1 Sid. 105.

Quod iret de York ad A., or carry goods from York to A., without saying that A. is within the jurisdiction. R. 1 Rol. 545. l. 35. 45. Cro. Car. 571.

That he would procure the lease of a house in A., without saying that A. is within the jurisdiction. R. 1 Lev. 50. 1 Vent. 2.

That he would pay when he returned to A., without such allegation. R. Cro. Car. 571. Jon. 451.

So, if one sues an heir upon an obligation by his ancestor, without saying that he has assets there; though he says that the obligation was made within the jurisdiction. R. 1 Rol. 494. l. 35.

If one sues for slander within the jurisdiction by which he has lost her marriage, &c. without saying that the loss (which is the gist of the action) was there. R. 1 Sid. 85. 95. Ray. 63. 1 Lev. 69. 153.

But if an action be, that he sued *infra jurisdictionem* in the name of A. without his consent, *ratione cujus* others sued him: it need not be said, that the other suits were *infra jurisdictionem*; for the suit in the name of A., without consent, is the sole ground of the action. R. Jon. 448.

So, if an action be for slander, *per quod* he lost customers *infra jurisdictionem & alibi*. R. Jon. 450. Mod. Ca. 224.

In an action upon the case for abusing a horse committed to his care, by riding, it need not be said that he rode *infra jurisdictionem*; for the gist of the action is the neglect. B. Mod. Ca. 224.

[.] If in *assumpsit* the plaintiff says, that upon an account for debts *infra jurisdictionem* the defendant was indebted to him in so much, viz. for value received, without saying *infra jurisdictionem*. F. g. 44. 2 Mod. Ca. 77.

[If the account is laid to be stated *infra jurisdictionem*, it is not necessary to aver the items to have arisen there. H. 2 G. 2. Str. 827. Ld. Raym. 1555.]

COURTS.

(P 10.) Plea.

By custom, the defendant in debt, without denying the debt, may pray, *quod inquiratur de vero dubito secundum consuetudinem*, upon which the plaintiff shall have judgment for the debt found. R. 1 Rol. 564. l. 25.

(P 11.) Continuance.

After appearance until judgment, a continuance ought to be entered from one court to another. 1 Rol. 486. l. 10. 30. 45. Vide Pleader, (V 1, &c. W 1, &c.)

And therefore *dies datus* to the plaintiff, without a day also to the defendant, is error. R. 1 Rol. 486. l. 30.

And the court shall have a power to make continuances as incident. R. 1 Sal. 408. Vide ante, (P 4.)

But a continuance by *dies datus* is sufficient, though it is not said *dat. per cur.* R. 1 Sal. 265.

So, a continuance from one court to another ; though the charter allows a court from week to week, and it is adjourned to the second week, leaving a week between, except where the charter says, *non aliter*. R. 1 Rol. 526. l. 50.

Vide Amendment, (I).

(P 12.) Inquest.

The trial in an inferior court shall be by an inquest of twelve lawful men.

And the entry may be *quod venire fac. 12, &c. per quos, &c.* without entering it at large. Ray. 20.

So, the *venire* may be for twenty-four or twenty-three in an inferior court, if the trial be by twelve of them.

[By st. 29 G. 2. c. 19. judges of courts of record in cities, towns corporate, liberties and franchises, may fine juror not attending, from 20s. to 40s.]

But a trial by six only is not good ; for a custom for it shall be void. R. 1 Rol. 564. l. 12.

So, it cannot grant a *tales* ; for an inferior court is not within the st. 35 H. 8. 6. and a custom for it is void. R. 1 Rol. 563. l. 50.

But there may be a *tales de circumstantibus* by prescription ; and if there be added *secundum formam statuti*, it shall be rejected. R. F. g. 274.

[It is not a good custom for an inferior court to award a *tales de circumstantibus*. M. 6 G. 2. Str. 941.]

If the jury do not agree, an inferior court may keep them without eating, drinking, or fire ; and adjourn the court *toties quoties* till they are agreed. 1 Sal. 201.

[*]A *venire fac. coram majore*, without saying *hic*, or *in cur.*, is error. Per Twisd. 1 Sid. 77.

So, a *ven. fac. xii per quos rei veritas scire poterit*, for *sciri*. R. 2 Lev. 83.

So, it is error, if the jury find the defendant guilty, without saying, *super sacramentum suum*. R. Hob. 248.

If they find that the plaintiff has 40s. damage by the nonperformance of the defendant's promise ; for they ought to say directly *quod assumpsit*. R. Yel. 77.

If the entry be *quod juratores electi, triati, & jurati dicunt*, without saying, *ad veritatem dicend.* R. 2 Lev. 83.

Vide Amendment, (P).

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(P 13.) Judgment.

So, the judgment in an inferior court ought strictly to pursue the legal form; and therefore if it be *ideo consideratum est*, without saying *per curiam*, it will be error. R. 1 Sand. 74. 1 Sid. 143. 147.

So, *ideo videtur curiæ*. R. Yel. 130. Noy, 129.

Ideo liquet, or, *concessum est*. Yel. 130.

Ideo consideratum est per curiam, without saying, *quia videtur curiæ quod placitum est minus sufficiens*. R. 1 Sal. 402.

So, if it be *quod querens nil capiat per narrationem*, where it ought to be *per querelam*. R. Show. 400.

[If judgment is that plaintiff ought to recover, it is bad, and shall be reversed on writ of false judgment: it ought to be, that he do recover. T. 27 & 28 G. 2. 2 Wils. 16.]

So, if *pleg. in misericordia* be omitted in a judgment in replevin. Sho. 400.

But in a county palatine, *ideo consideratum est*, without saying *per curiam*, is sufficient. R. 1 Sand. 74.

So, in an inferior court a judgment *quod recuperet pro damnis*, &c. is good, without saying *pro misis et custagiis*; for *damna* includes them. 2 Cro. 420.

So, *quod recuperit pro misis et custagiis de incremento*, without saying *circa sectam suam*. Ray. 20.

[By the st. 19 Geo. 3. c. 70. s. 4. in all cases where final judgment shall be obtained in an inferior court, and an affidavit made thereof in any court of record at Westminster, and of execution having issued against the person or effects of the defendant, and that the same cannot be found within the jurisdiction of the inferior court, the record of such judgment may be removed into the superior court, and writs of execution issued to the sheriff of any county, &c.]

[Of Great Sessions.—The ground of a judgment in one of the courts of great sessions, may be questioned in an action upon the judgment. Dougl. 6.]

[An indictment for a misdemeanour, may be removed by a certiorari from the court of great sessions in Wales into the K. B. 3 T. R. 658.]

[To remove a cause from the great sessions of Wales to the court of exchequer under 33 Geo. 3. c. 68., the proper course is by certiorari. 2 Anst. 480.]

[For the Election of Knights of the Shire.—An officer presiding at the election of knights of the shire, may order one who disturbs the proceedings [*] to be taken into custody, and carried before a magistrate, to be dealt with according to law. 1 Taunt. 146.]

[Board of Controul in India Affairs.—If a particular tribunal is appointed to determine whether a court or body of persons have exceeded their jurisdiction, no other tribunal can interfere. Thus, by 33 Geo. 3. c. 52. the board of controul have authority to issue orders to the governments in India, in certain cases only; and if in the opinion of the court of directors, who are to transmit the orders, the board have exceeded their powers, the court are to appeal to the king in council, by whom the question is to be determined. Held, on an application for a mandamus to the court of directors, to transmit certain orders of the board of controul, the question whether the board had exceeded their authority could not be agitated. 4 M. & S. 279.]

[*Of Commissioners for trying Offences committed abroad.*—Commissioners under st. 33 Hen. 8. c. 23. and 43 Geo. 3. c. 113. s. 6. have no jurisdiction over an offence committed out of the king's dominions by an alien enemy, prisoner of war, though serving by agreement as a mariner on board an English merchant ship. 1 Taunt. 26.]

[*Foreign.*—No action will lie upon a foreign judgment, on the face of which it appears that the defendant, not resident within the jurisdiction of the foreign court, was neither served with process, nor came in to defend the action. 9 East, 192.]

[An action lies on a foreign judgment notwithstanding a stay of execution awarded thereon. 11 East, 118.]

[An action lies on the original demand, notwithstanding a foreign judgment thereon. 11 East, 118.]

[A judgment in a foreign court is, until reversed, conclusive evidence against one who was a party to, and had notice of the suit. 4 M. & S. 20.]

[The laws of England pay such comity to foreign courts, as to consider their judgment binding as between the parties to the suit in which it is given; and, as far as respects the property affected thereby (as in the instance of prize), but not as between strangers. 4 M. & S. 141.]

[*Indebitatus assumpsit* will lie on the judgment on a foreign court, without declaring upon, or proving the grounds and cause of action on which the judgment went, Loft, 148.]

[If a foreign judgment is called a record in the declaration, and the conclusion is *prout patet per recordum*, it is surplusage, and not traversable by a plea of *nul tiel record*. Dougl. 1.]

[*Nul tiel record* is no plea to an action on a foreign judgment. Dougl. 1.]

[In an action upon the judgment of a court in a foreign country, the sentence must be proved by proving the hand-writing of the judge of the court who subscribed it, and the authenticity of the seal affixed. 3 East, 221.]

Vide Amendment, (R).

(P 14.) Writ of enquiry.

After a judgment by default, &c. a writ of enquiry shall be executed.

And it shall be executed in court, unless where the charter allows it to be before the bailiff, &c. R. 1 Rol. 526. l. 35.

And where the charter allows it before the bailiff, serjeant, &c. it shall not be before the mayor, who is the judge of the court. R. Yel. 69.

[*](P 15.) The remedy, if out of the jurisdiction.

By the st. W. 1. 3 Ed. 1. 35., of great men and others, who attach, &c. others to answer before them of trespasses, contracts, &c. done out of their jurisdiction, it is provided, that they answer to the person attached damages double, &c.

And therefore, if any sue in an inferior court for a matter arising out of the jurisdiction, an action lies for double damages upon that statute. 2 Inst. 230.

So, a prohibition goes to stay such suit. F. N. B. 45 F. 2 Inst. 230. Vide Prohibition, (A 1, 2.)

And such prohibition goes before the action commenced. 2 Inst. 230.

Or, after declaration, before plea in bar or imparlance, the defendant may tender a plea to the jurisdiction, upon affidavit of the fact; and if it be re-

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used, he shall have a prohibition. R. 2 Sid. 464. 1 Vent. 88. 181. R. Ray. 189.

So, where an imparlance is given with the declaration of course, he may, within two days after the declaration. R. 1 Vent. 333. Per Powel, Lut. 1571.

So, upon an affidavit of the fact, he may have a prohibition without pleading to the jurisdiction. Per two J., one cont. Lut. 1026.

Or, if a plea to the jurisdiction be prevented by artifice. 2 Mod. 273.

So, if a plea to the jurisdiction be refused, he may have a bill of exceptions, and tender it to be sealed; and thereby take advantage of that matter upon error. Semb. F. N. B. 21. N. D. 1 Vent. 181.

And a prohibition lies after a plea to the jurisdiction refused, though the matter be alleged to be within the jurisdiction. R. 2 Rol. 317. l. 30.

In transitory as well as real actions.

Where the defendant is attached by his goods, or by his body. F. N. B. 45. F.

So, if the declaration does not allege the matter to be within the jurisdiction, a prohibition lies at any time. 2 Mod. 273.

Or, it may be redressed by error. R. 2 Cro. 96. [or false judgment. Cowp. 20.]

So, if it appears to be out of the jurisdiction, the judgment is void, and *coram non judice*. R. 1 Rol. 545. l. 30.

And if the man or his goods are taken upon it, trespass lies.

Or, if he escapes, no action lies against the officer for the escape. R. 1 Rol. 545. l. 30. 809. l. 50.

So, such judgment cannot be pleaded in bar to another action for the same cause. R. 3 Lev. 234.

So, where a man sues in an inferior jurisdiction for a matter which he knows to be out of the jurisdiction, an action on the case lies against him. Semb. cont. Lut. 1569. R. 1 Vent. 369. (Acc. 2 Wils. 302.)

[And an action of false imprisonment lies against the judge of an inferior court, where the plaintiff is arrested on process from it, if the judge know that the matter was out of his jurisdiction. Str. 993. B. R. H. 68. 2 Wils. 385.]

Or, if the judge refuses a plea there, which he ought to receive. Per Jones, 2 Rol. 498.

But where the matter is supposed within the jurisdiction, and the defendant does not plead to the jurisdiction, but imparls, or pleads another matter, by which he admits the jurisdiction; he shall never [*] afterwards have a prohibition, though it be out of the jurisdiction. Adm. 1 Vent. 88. 181. R. 2 Mod. 273. 1 Mod. 63. 81. 1 Sal. 202.

Nor, an action upon the statute for double damages. 2 Inst. 230.

Nor, relief by error. 1 Vent. 236. Vide 1 Vent. 369.

So, an officer shall be excused though it does not appear by the process to be within the jurisdiction, and in fact it be out of it; for it is sufficient that it be alleged in the plaint or declaration. R. 2 Mod. 59. 195.

[In justification, by the officer, it is sufficient to state that the plaintiff below levied his plaint in a plea of trespass on the case, for a cause of action arising within the jurisdiction of the court, without setting forth the cause of action, or that the defendant became indebted within the jurisdiction. Cowp. 18.]

So, an action lies against the officer for an escape. R. 1 Sal. 202. R. P. 7 Ann. (Com. 153.) R. cont. per three J. Ellis acc. 2 Mod. 30.

Though the officer had notice that it arose out of the jurisdiction. Vide Com. 153. 156.

So, an action on the case does not lie against an officer, who is not consultant. R. Lut. 1568.

Nor, against the plaintiff in the inferior court. R. Lut. 1560. 1569. 1572. Carth. 190.

Though he knew that the cause of action arose out of the jurisdiction. Semb. Lut. 1569. Vide supra, (contra).

[Where the party (the plaintiff below) pleads a justification under process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court; but the officers of the court need not. C. P. M. 11 Geo. 2. Com. 574. Willes, 30. S. C. Infra, tit. Pleader, (3 M. 24.)]

So, if a prohibition, upon a suggestion that it arises out of the jurisdiction, goes to a suit in an inferior court, a *procedendo* shall be granted if it appears to be within the jurisdiction; as, if a prohibition be to the courts of London, for slander of the plaintiff in saying that she is a whore, a *procedendo* shall be granted, upon affidavit that the speaking was in London, where such words are actionable, without a return of the custom upon an *habeas corpus*. Show. 131. 4 Mod. 367.

[Judgments of inferior executed upon certain conditions by superior courts. 19 G. 3. c. 70. s. 4.]

(P 16.) Misdemeanor in the judge or officers.

So, for a misdemeanor in the steward or judge of an inferior court, an attachment lies against him as for a contempt: as, if he gives judgment where he himself is party. 1 Sal. 201. 396.

If he grants a new trial after judgment and costs taxed. 1 Sal. 201.

If he grants an attachment against all the goods of the party. Ibid.

If he refuses a return and execution of a writ of error, though his fees are not paid or tendered. Lane, 16.

But a man, who acts as a judge, can never be questioned by action or indictment, for a matter within his jurisdiction, though he be mistaken. R. 1 Sal. 396, 7. Vide Action upon the Case for a Conspiracy, (B).

[But this extends only to the judges of the king's courts of record. C. P. E. 17 Geo. 3. 2 Bl. 1141.]

So, an attachment does not go, where the contempt is not manifest: [*]as, if a judgment be against B. and satisfied, and afterwards another action between the same parties, and a writ of error upon it delivered before judgment, upon which the steward returns the former judgment. Ray. 189.

(Q) THE COURSE OF THE COURT.

The course of the court is the law of the court.

And the judges will generally take notice of the course and law of every court.

As, upon a writ of error, the court of B. R. will take notice what are the particular laws and customs of the place where the judgment was given, without a return of them upon record: as, that the proceedings in Berwick are in English. R. 1 Sal. 269.

So, of the form of pleading, &c. in C. B. the court of B. R. will take notice; for it cannot be tried, if it should be specially assigned. R. 2 R. 3. 9. b.

[The judge of an inferior court cannot grant a new trial; but for matters [*357]

of irregularity, where the proceedings are contrary to the practice and rules of the court, he may set aside the judgment. Semb. M. 7 G. Str. 392. B. R. E. 20 Geo. 3. Dougl. 379.]

[He may set aside a writ of enquiry or judgment, though strictly regular, if obtained by fraud or surprise. M. 4 G. Fort. 198.]

[He may set aside a regular interlocutory judgment, in order to let in the trial of the merits. P. 31 G. 2. 1 B. E. 568.]

[He may set aside a verdict, when after notice of trial a reference is agreed to, and plaintiff without new notice goes to trial. M. 8 G. Str. 499.]

[He may set aside a verdict for irregularity, but not upon the merits. P. 13 G. 2. 1 B. M. 568.]

IN WHAT COURT ERROR SHALL BE BROUGHT. Vide PLEADER, (3 B 1, &c.)

IN WHAT COURT A QUIT FOR THE KING'S DEBT SHALL BE BROUGHT. Vide DETT, (G 11.)

SUIT OF COURT. Vide COPYHOLD, (K 13, &c.)

ERECTION OF COURTS. Vide PREROGATIVE, (D 28.)

PROCEEDINGS IN COURTS, WHEN EVIDENCE. Vide EVIDENCE, (C 1.)

For more concerning courts, vide ABATEMENT, (D 6.)—ASSISE (B 7.)—AUDITA QUERELA, (E 2.)—DISMES, (M 5, &c.)—EXECUTION, (I 1, &c.)—PRIVILEGE, (A 1.—C 1.)—PROHIBITION.—QUO WARRANTO, (C 1.)

CREDIT.

BILL OF CREDIT. Vide MERCHANT, (F 3.)

CREDITOR.

Vide BANKRUPT, (D 3.)

[*]CREEK.

Vide NAVIGATION, (C).

CROSS-REMAINDERS.

Vide DEVISE, (N 14, 15.)

CROWN.

Vide FRANCHISES, (G 1.)—PREROGATIVE.—ROY, (A 1, 2.)—SCOTLAND, (D 2.)

LIMITATION OF THE CROWN. Vide PARLIAMENT, (H 18, 19.)

PLEAS OF THE CROWN. Vide ACTION, (D 1.)—JUSTICES.—JUSTICES OF PEACE.

CUI ANTE DIVORTIUM.

Vide DUM FUIT INFRA ÆTATEM (G).

CUI IN VITA.

Vide **BARON** and **FEME**, (I 3.)

CUM PERTINENTIIS.

Vide **GRANT**, (E 9.)

CURIA CLAUDENDA.

Vide **DROIT**, (M 1, 2.)

CURSING AND SWEARING.

Vide **JUSTICES OF PEACE**, (B 23.)

CURTESY OF ENGLAND.

Vide **COPYHOLD**, (K 1.)—**ESTATES**, (D 1, 2.)—**WASTE**, (F 2.)

[*]CURTILAGE.

Vide **GRANT**, (E 7.)

CUSTOM.

- CUSTOM.** Vide **CHANCERY**, (2 Y—3 D 3.)—**COPYHOLD**, (K 1, &c.—S 1, &c.)—**DISMES**, (H 16.)—**DOWER**, (B).—**GUARDIAN**, (G 1, &c.)—**PARCENERS**, (B).—**PARLIAMENT**, (R 24.)—**PLEADER**, (C 38.—3 K 3. 28.)—**PROHIBITION**, (F 12.)—**TRADE**, (D 2.)
- CUSTOMS.** Vide **PARLIAMENT**, (H 11, &c.)—**PREROGATIVE**, (D 43, &c.)—**TRADE**, (C 1, &c.)
- CUSTOMS OF LONDON.** Vide **GUARDIAN**, (G 1, &c.)—**LONDON**, (M—N 1, &c.)—**WASTE**, (B 1, 2.)
- CUSTOMS AND SERVICES.** Vide **DROIT**, (G).
- CUSTOMARY CONVEYANCE.** Vide **BARON AND FEME**, (G 4.)
- CUSTOMARY COURT.** Vide **COPYHOLD**, (R 2, &c.)

CUSTOS BREVIUM.

Vide **COURTS**, (C 3.)

CUSTOS REGNI.

Vide **ROY**, (H 1, 2.)

CUSTOS ROTULORUM.

Vide **CHANCERY**, (B 4.)—**JUSTICES OF PEACE**, (D 4.)
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CUSTOS SPIRITUALIUM.

Vide PREROGATIVE, (D 26, 27.)

CYPRESS.

Vide CONDITION, (L 1.)

DAMAGE-FEASANT.

Vide DISTRESS, (B 4.)—PLEADER, (3 K 21, &c.—3 M 26.)

[*]DAMAGES.

(A) DAMAGES, WHEN RECOVERED.

(A 1.) By the common law. p. 360.

(A 2.) When not. p. 361.

(A 3.) When by statute. p. 361.

(B) TO [AND FROM] WHOM DAMAGES BELONG. p. 362.

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(E) HOW ASSESSED.

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(E 8.) Defect in assessing aided by release. p. 372.

(A) DAMAGES, WHEN RECOVERED.

(A 1.) By the common law.

By the common law, in all actions personal and mixt, damages were recoverable. 2 Inst. 286.

And though the plaintiff recovers the thing itself demanded, yet he also recovers damages: as, in *detinue*. 2 H. 6. 15.

In attaint, though he obtains a reversal of the former verdict. 1 Rol. 74. l. 47.

In ward of the body and land. 17 Ed. 3. 72. b.

In prohibition. 1 Rol. 575. l. 30.

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In *audita querela*. 1 Rol. 575. l. 20.

In account, as receiver. R. 1 Rol. 575. l. 45. 55. 1 Leo. 302. Vide post, (A 2.)

In an appeal of mayhem, though he does not count for damages. 1 Rol. 575. l. 17.

So, in all actions upon statutes, which give damages to the party grieved, or a certain penalty, the plaintiff recovers damages over and above the penalty. R. 1 Rol. 574. l. 20. 35.

So, in an action founded upon a statute, which prohibits any thing.

In actions where damages are recoverable, the successor, where he is elective, shall recover damages for the time of his predecessor. 1 Rol. 569. l. 20. 25.

[If a man lawfully possessed of lands, &c. leaves any goods upon the premises after his interest is at an end, the landlord can do no act which may occasion their destruction. Ld. R. 189.]

[*][Thus, if a lessee for years leaves corn upon the land at the end of his term, the lessor cannot justify putting his cattle upon that part of the land where the corn lies, and letting them eat it. D. arg. Ld. R. 189.]

[So, a landlord can do no act which may occasion the destruction of the goods of another which are on his land, unless they were wrongfully put upon such land. Ld. R. 189.]

[Thus, if the proprietor of tithes neglects removing them within a convenient time, the owner of the land on which they lie cannot justify putting his cattle upon such land, and letting them eat the tithes. Ld. R. 189.]

(A 2.) When not.

But by the common law no damages were recoverable in a real action. 2 Inst. 286. 10 Co. 116. a.

Nor, in an assise, except against the disseisor himself. 2 Inst. 284.

Nor, in a *quare impedit*. 2 Inst. 362.

Or, partition. 1 Rol. 575. l. 14.

Nor, in a *perambulatione facienda*. 1 Rol. 575. l. 7.

Nor, in disceit, upon a recovery by default. 1 Rol. 575. l. 23.

Nor, in account. 1 Rol. 575. l. 8. 11. Vide ante, (A 1.)

Nor, in *warrantia chartæ*, where the plaintiff recovers *pro loco & tempore*. 1 Rol. 574. l. 49.

Nor in a *scire facias*, or other writ of execution. 1 Rol. 574. l. 42.

Nor, in an information, or action by *qui tam* upon a penal statute, though it be for a certain penalty. R. 1 Rol. 574. l. 40.

A successor who is presentative, as a parson, &c. shall not recover damages for the time of his predecessor. 1 Rol. 569. l. 22.

Nor, an heir, or executor, for the time of his ancestor or testator. 1 Rol. 569. l. 15. 17.

Nor, a reversion upon a term for years, if he recovers in an assise. 1 Rol. 569. l. 30.

(A 3.) When by statute.

Yet now by the st. of Merton, 20 H. 3. 1. damages shall be recovered in dower *unde nihil habet*.

By the st. of Gloc. 6 Ed. 1. 1. in a writ of entry *sur disseisin*: be it in the *per*, in the *per* and *cui*, or in the *post*. 2 Inst. 286. Dy. 370. b.

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In an action against the alienee of the disseisor, if the disseisor has not sufficient.

And by equity, against any one, who has the land from the disseisor by title, or by wrong. 2 Inst. 284.

So, by the same statute, in mortd'ancestor, cosinage, aiel, or besaiel, or other action against the tenant for his own intrusion, or his own act. 2 Inst. 287. 289.

And the damages shall be computed for the time from the death of the ancestor to whom the demandant makes himself heir. 2 Inst. 288.

So, by the st. W. 2. 5. in an assise of *darrein presentment*, and *quare impedit*, *adjudicentur damna*, viz. *si tempus semestre transierit per impedimentum alicujus, & episcopus ecclesiam conferat, & verus patronus ea vice presentationem suam amittat; sint damna ad valorem ecclesiæ per duos annos: si tempus semestre non transierit, damna ad valorem medietatis ecclesiæ per unum annum.*

[*]And therefore, where the patron loses his presentation, *hac vice*, he shall recover damages to the value of the church for two years. 2 Inst. 362.

If the bishop has not collated by lapse, he has his election to recover double damages, and lose his presentation; or to recover his presentation, and single damages only. 2 Inst. 362.

If the patron recover within six months, he shall have damages only for half a year. 2 Inst. 362.

Though the bishop has collated within that time; for, the collation being unlawful, he shall not lose his presentation. 2 Inst. 363.

But the king shall not recover damages in a *quare impedit*: for he is not within the st. W. 2. 5. R. 6 Co. 51. a. Semb. 1 Leo. 150. Cro. El. 162.

By the st. 7 H. 8. 4. & 21 H. 8. 19. an avowant, &c. shall recover damages and costs. Dub. Whether he shall recover damages. 2 Rol. 75.

By the st. 33 H. 8. 39. in all suits on specialty to the king, the king shall recover costs and damages, as common persons use to do in suits for their debts.

[By 13 G. 2. c. 21. persons drowning coal-pits (except the owners) shall pay treble damages and full costs.]

Vide Costs, (C 1, &c.)

(B) TO [AND FROM] WHOM DAMAGES BELONG.

The damages shall be to him who sustains the loss: and therefore, in waste by a surviving sister and niece, for waste in the life of the other sister, the aunt only shall recover the damages, and not the niece. Co. L. 198. a.

So, if the aunt and the niece join in a mortd'ancestor, the aunt only shall recover the damages until the death of her sister. 2 Inst. 288.

But where the aunt and niece join for waste done in their time, they both shall recover damages. 2 Inst. 305.

Or, in mortd'ancestor, both shall recover damages for the time after the death of the deceased sister. 2 Inst. 288.

So, if they join in waste, as they may, for waste done in the time of the deceased sister, and also in their own time; the aunt only shall have judgment for the damage in the life of her sister, and both shall have judgment for the place wasted, and treble damages for the waste done afterwards. 2 Inst. 305.

[Where the plaintiff had been dismissed from his master's employ before the expiration of the period for which he had been engaged, in consequence of an accusation preferred by the defendant to the master, that the plaintiff

had maliciously cut the defendant's cordage: Held, that as the dismissal was wrongful, the only remedy was against the master. 8 East, 1.]

(C) DAMAGES, HOW SAVED.

If the defendant in dower *unde nihil habet* comes at the first day, and pleads *tout temps prist*, and this cannot be denied, he shall save his damages. Co. L. 32. b.

[*]So, in admeasurement of dower, if the defendant at the first day pleads *prist d'admeasure*. 1 Rol. 573. l. 45.

So, in dower, if at the first day of the summons the heir comes and pleads *touts temps prist*, and the demandant does not reply, a request; for the heir has title. Co. L. 32. b. 33. a.

So, in detinue, if the garnishee comes the first day, and acknowledges the condition broken, he shall save his damages; for they are given against him for his delay. 1 Rol. 573. l. 49. 8 H. 6. 11.

So if he makes default. 1 Rol. 573. l. 52.

So, in detinue of charters against an executor, upon a *devenerunt ad manus* after the death of the testator, if he pleads *touts temps prist* after the charters came to his hands. 1 Rol. 574. l. 5.

But the defendant does not save his damages, if he does not come upon the first process, at the first day after the return. 1 Rol. 573. l. 54. 574. l. 8.

So, a wrong-doer does not save his damages, if he comes the first day: as, in aiel, cosinage, &c. if the tenant at the first day tenders the land, and pleads, *touts temps prist*. Co. L. 33. a.

(D) FOR WHAT TIME TO BE ALLOWED.

In personal actions, damages are allowed only to the time of the action commenced.

[For money lent, interest shall be given from the time the money was payable, to the time of liquidating the debt, by the courts giving judgment. 2 Brown. 1081. 1086.]

[So, on a bill of exchange it is usual to calculate the interest up to the time when judgment may be entered up.]

[And it is now settled as a general rule, that where a new action may be brought, and a new satisfaction obtained on that, for duties or demands arisen since the commencement of the depending suit, these shall not be included in the judgment on the former action: but where the interest is an accessory to the principal, and the plaintiff cannot bring a new action for interest grown due between the commencement of the action and the judgment, it shall be included. 2 Brown, 1086, 1087.]

[In an action on a bond payable with Indian interest, plaintiff is entitled to have the sum lent, together with Indian interest up to the time of signing the judgment; and the legal interest of this country on the accumulated sum ascertained by the judgment, from the time of signing the judgment, till actual payment of the money. Id. 1096.]

[But he cannot recover the latter without another action. Vide Bur. 1096 to 1098, unless the delay has been occasioned by a writ of error, and then, a court of error may give interest or damages on the sum recovered by the original judgment on the affirmance of it. Doug. 752.]

[And a jury may give interest on book debts in the name of damages. Id. 676.]

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But in real actions, the demandant shall not count of damages : for he shall recover till the time of the verdict. 10 Co. 117. a.

Or, if a writ of inquiry be awarded, till the time of the writ. 10 Co. 117. a.

[A plaintiff cannot recover damages for a period of time during which it appears he did not sustain any ; and if he demands damages *inter alia* [*] for that time, and has a general verdict, the judgment shall be arrested. Ld. R. 248.]

[Thus, where the plaintiff declared that the defendant, on the 3d day of August, did an act which occasioned a consequential injury to his close, *per quod* he lost the use of it from the 2d July to the commencement of his suit, upon which he had a general verdict, the court arrested the judgment. Ld. R. 248. P. C.]

(E) HOW ASSESSED.

(E 1.) By the jury which tries the issue.

In all cases where the issue is tried by a jury, and damages are recoverable, the damages regularly ought to be assessed by the jury.

And, if they do it not, where damages only are recoverable, the verdict shall be void.

{ So if judgment be by confession, but for no certain sum, in an action sounding in damages, the court cannot assess the damages ; but a writ of inquiry should be executed. *Dunbar v. Lindenberger*, 3 Munf. 169. Vide *Owings v. Goodwin*, 1 Har. & Johns. 33. }

And the omission cannot be supplied by a writ of enquiry ; for thereby the defendant will lose the benefit of a writ of attain, if the damages are excessive. R. 11. Co. 56. a. Vide post, (E 2. 8.)

Nor, by a release of damages. Vide post, (E 2. 8.) contra.

So, if there be several defendants, and one makes default, and the other pleads to issue ; though a writ of inquiry be awarded upon the default to avoid a discontinuance, yet it does not issue ; for the jury which tries the issue shall assess damages against all the defendants. 11 Co. 6. R. 2 Cro. 349. 1 Leo. 141.

So, if the defendants plead severally, and there are several issues, the jury which tries the first issue shall assess damages against all ; and the second inquest need not assess any damages. R. 11 Co. 5, 6, 7.

And if the second inquest assess damages also, the plaintiff shall have his election *de melioribus damnis*. R. 11 Co. 5, 6, 7. (Vide 1 Wils. 30.)

And in such case there is no need of a release of the damages assessed by the other inquest ; for the acceptance of the greater damages is a waiver of the less. R. Cro. Car. 193. Semb. Cro. Car. 243.

So, if there be a demurrer to part, or by one defendant, and issue as to other part, or by another defendant, the jury which tries the issue shall assess damages upon the demurrer conditionally. Lut. 875. b. 2 Rol. 723. l. 5. D. 2 Sand. 26.

And it shall not be supplied by a writ of inquiry. Dub. 2 Rol. 723. l. 5.

So, if there be a demurrer upon the evidence, the jury which was charged with the issue may assess damages conditionally. Cro. Car. 143.

[Where the general issue and special plea are pleaded, and on demurrer to the last, there is judgment by default, the damages thereon must be assessed by the jury at the trial, not by writ of inquiry. 2 B. & P. 163.]

(E 2.) When they need not.

But where there is judgment, without any issue tried, damages shall be assessed by the court, or by a writ of inquiry. Vide Pleader, (Z 1, &c.) [Vide Doug. 316. n.] { Vide Renner v. Marshall, 1 Wheat. 215.

So, it seems, in an action on a covenant for payment of a certain sum the court may assess the damages, without the intervention of a jury. Dicken v. Smith, 1 Litt. 209. }

[The court will not refer the ascertaining of damages to prothonotary. Barnes, 428.]

[*][So, if there be a demurrer to the evidence upon a trial, the jury may be discharged without assessing the damages, which shall be supplied by a writ of inquiry. R. Cro. Car. 143.

So, in replevin, if the plaintiff be nonsuited at nisi prius, and the jury do not inquire for the avowant, it may be supplied by a writ of inquiry. R. 2 Rol. 112.

So, if there be judgment for debt as well as damages, and the jury do not assess any damages, it may be aided by a release of the damages: as, in debt, annuity, &c. 11 Co. 56. a. Bentham.

So, in ejectment of the custody of the land and of the heir, and intire damages, where they do not lie for the heir; it shall be aided, if the defendant releases his damages, and takes judgment for the land only. 11 Co. 56. a. Vide post, (E 5, 6.)

[Where the jury refuse to find for the plaintiff, from inability to estimate his damages, the court will enter one with nominal damages. 1 Taunt. 121.]

Vide post. (E 8.)

(E 3.) To what value.—Not more than in the declaration.

So, the jury cannot regularly assess more damages than are alleged by the plaintiff in his declaration. 10 Co. 117. 1 Rol. 578. l. 5. R. Yel. 45. 70. { Vide Smith v. Allen, 5 Day, 337. Gratz v. Phillips, 5 Binn. 564. Cloud v. Campbell, 4 Munf. 214.

But it seems, that in any action on the case, where the damages are assessed for a greater amount than the sum laid in the declaration, but the same laid in the writ is large enough to cover them, the writ may be referred to for the purpose of amendment, and that the judgment may be sustained. Palmer v. Mill, 3 Hen. & Munf. 502. Kennedy v. Woods, 3 Bibb, 322. }

[If the jury (by allowing interest on a judgment) give greater damages than laid; on error brought, plaintiff shall not have liberty in another term to remit the surplus, to enter judgment for the damages laid only. P. 12 G. 2. Str. 1110.]

[Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a remittitur of the excess above the sum laid, on payment of the costs of the writ of error. C. P. T. 31 Geo. 3. 1 H. Bl. 643.] { Fury v. Stone, 2 Dall. 184. S. C. 1 Yeates. 186. Lewis v. Cooke, 1 Har. & M'Hen. 159. Holeman v. Coleman, 1 Marsh, 296.

It seems, that the excess must be remitted before judgment. Bealle's Adm'r. v. Schoal's Ex'r. 1 Marsh. 475. }

Nor more for damages and costs together; for it does not appear how much was intended for damages. 1 Rol. 578. l. 45.

So, the plaintiff shall not recover more damages against a vouchee than are in the count; for he comes *loco tenentis*. 1 Rol. 578. l. 7.

The damages ought to be assessed in direct terms; for it is not sufficient to say, that the defendant took goods to the value of 20s.

But the jury may assess for damages as much as the plaintiff has counted for; and also for costs, beyond that sum. R. Cro. El. 866. 10 Co. 117. b. 1 Rol. 578. l. 35. R. 2 Cro. 69. 297. R. Yel. 70.

So, the court may tax, for damages and costs together, beyond the damages alleged in the declaration: as, in debt *ad damnum* 10*l.* judgment *quod recuperet debitum & damna sua, &c.* *ad* 12*l.* is well. R. 1 Rol. 579. l. 5.

{ So in an action on a single bond, the jury may give damages beyond the amount mentioned in the obligation, for the detention of the debt; but the damages ought to be severed, and found distinct from the debt. Rowlain v. M'Dowall, 1 Bay, 482.

So, it seems, that in debt upon a penal bond, the jury may assess damages beyond those laid in the declaration, provided they do not exceed the amount of the penalty. Payne v. Ellzey, 2 Wash. 143. Winslow v. The Commonwealth, 2 Hen. & Munf. 465. Vide Tennant's Ex'r. v. Gray, 5 Munf. 494. Cosby's Ex'r's v. Bell's Adm'r. 6 Munf. 282. }

So, in real actions, where no damages are mentioned in the count, the demandant shall recover his damage to the time of the verdict, or writ of enquiry. 10 Co. 117. a.

So, in detinue, the plaintiff may recover against the garnishee more damages than were alleged in the declaration; because he recovers for delay after his declaration. 1 Rol. 575. l. 10.

[If a jewel, for which trover is brought, is not produced, it shall be presumed to be of the finest water, and damages shall be given accordingly. H. 8 G. Str. 505.]

[*] In action against the sheriff for false return on mesne process, in debt on judgment where the defendant is in bad circumstances, the whole debt given in damages against the sheriff. Had the defendant been in good circumstances, not so much. M. 12 G. Str. 650.]

[In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, viz. the sum indorsed on the writ, and the legal fees of execution. 2 Term. Rep. 126.]

{ In an action against a county for an escape on *mesne process*, damages, on inquiry, may be given to the amount due the plaintiff in the first suit with interest. Hubbard v. Shaler, 2 Day, 195.

So in an action on the case against the sheriff for not returning an execution, and for a false return, he is liable for the whole amount of the execution. Ackley v. Chester, 5 Day, 221. }

[Damages are to be estimated according to the rank and ability of the offender, the nature of the offence, and the circumstances of aggravation or extenuation. Lofft, 771.]

[A plaintiff cannot recover against the defendant more damages than he has counted of, 4 M. & S. 94.; and if the jury assess more damages than are laid in the declaration, and judgment be entered for the whole, it is error. 2 Blk. 1300.]

{ Payment of a bond will not be presumed from lapse of time merely, within a shorter period than 20 years; but where the demand is stale, the plaintiff will be held to strict proof of the amount of damages, which he is entitled to recover. Cottle v. Payne, 3 Day, 289.

In trespass, the damages are not limited to the value of the property destroyed. *Edwards v. Beach*, 3 Day, 447. *Churchill v. Watson*, 5 Day, 140. *Davenport v. Russell*, 5 Day, 145.

On reversal of judgment, the plaintiff in error is entitled to recover as part of the damages, the costs in the court below. *Eno v. Frisbie*, 5 Day, 122. }

(E 4.) When less.

So, the jury may assess damages to any value under the declaration ; as, to a penny, farthing, &c.

So, to half a farthing, &c. R. 2 Rol. 21.

So, upon a catching bargain, the jury may reduce the damages to a reasonable sum : as, where a promise was to pay for a horse a barley-corn, a nail, and double every nail, &c. they may give the value of the horse. R. 1 Lev. 111.

{ So, on a special agreement to deliver a promissory note, the jury may assess less damages than the amount of the note, where justice is done between the parties. *Pledger v. Wade*, 1 Bay, 33.

But in actions on contracts, it is usual to give damages to the amount specified ; yet under circumstances of fraud, or hardship, the jury may mitigate the damages. *Bourke v. Bulow*, 1 Bay, 50. Vide *Eveleigh v. Stitts' Adm'rs.* 1 Bay, 89. *Tyler v. Marsh*, 1 Day, 1. *Cutler v. How*, 8 Mass. Rep. 257. *Cutler v. Johnson*, 8 Mass. Rep. 266. *Baxter v. Wales*, 12 Mass. Rep. 365.

And it seems, that where the sum specified by the terms of a contract, is in nature of a penalty, the jury may give only the actual damages. *Merrill v. Merrill*, 15 Mass. Rep. 488. *Dennis v. Cummins*, 3 Johns. Cas. 297.

But if from the terms of the contract, and the circumstances attending it, it is obvious that the parties must have intended to liquidate the damages, the sum specified shall be the rule. *Slosson v. Beadle*, 7 Johns. Rep. 72. *Hasbrouck v. Tappen*, 15 Johns. Rep. 200. }

But, if the jury find according to the promise of the defendant, they are not subject to an attainder. *Semb.* 3 Lev. 150. Mo. 419.

So, where the jury of course find the damages alleged in the count, without evidence, they shall not be subject to an attainder for it. Dy. 369. b.

So, where the defendant confesses, or admits the damages for which the plaintiff counts, the jury ought to find so much ; as, in trespass for *rescous* of a distress *ad damnum* 40*l.*, if the defendant justifies by special matter, he admits the damages. 1 Rol. 578. l. 15.

So, in prohibition, if the defendant acknowledges the contempt alleged. 1 Rol. 578. l. 20.

So, in debt upon the st. 2 Ed. 6. 13. for not setting out his tithes, to the damage of 200*l.*, if the defendant does not take the damages by protestation, but pleads a discharge by the st. 31 H. 8. 13., and there is issue upon it. R. Al. 88.

So, in an action in the *debet et solet*, for subtracting suit to a mill, if the defendant confesses the action. 1 Rol. 578. l. 25.

In a writ of right of ward, if the defendant acknowledges his right to the ward. 1 Rol. 578. l. 27.

Yet a demurrer to a declaration does not amount to a confession of the damages, for which the plaintiff counts. 1 Rol. 578. l. 30.

[In debt for a penalty in articles, the jury ought to assess damages on the

breach assigned, according to the statute 8 & 9 W. 3. c. 10. and shall not find the debt; otherwise a *venire de novo* shall be awarded. 2 Wils. 377.]

[In an action on a bond damages may be recovered for more than the amount of the penalty. B. R. E. 28 Geo. 3. 2 T. R. 388. Vide 6 T. R. 303. contra.]

[*][In an action for money had and received, the plaintiff can recover no more than he is in conscience and equity entitled to; which can be no more than what remains after deducting all just allowance, which defendant has a right to retain out of the sum demanded. 4 Burr. 2133.]

[A. sells and warrants a horse to B., which B. a few days afterwards, sells to C., the horse proves unsound, and C. recovers the price from B. in an action, of which A. has notice. Held that B. was entitled to recover from A., not only the price of the horse, but the costs of the action by C. 2 Mars. 431. 7 Taunt. 153.]

(E 5.) When assessed severally.

In an action against divers persons, who are found guilty of several takings or offences, damages ought to be assessed against them severally; as, in trespass for a battery and goods, if one be found guilty for the battery, and the other for the goods taken. 1 Rol. 570. l. 42.

{ It seems, that in trespass, against several, jointly, the jury may apportion the damages according to the degree of guilt of each offender. *White v. M'Neily*, 1 Bay, 11. }

[In an action upon the case for malicious prosecution, of indictment of felony whereof plaintiff acquitted, against prosecutor and the justice who committed, several damages assessed. H. 4 G. Str. 79.] Sed vide infra, (E 6.) contra.

In debt against divers by several *præcipes*. 1 Rol. 570. l. 40.

In *decies tantum* against divers, damages shall be against them severally; for they are several takings. 1 Rol. 570. l. 35.

So, in an action against divers, if one is found guilty at one time, and another at another, several damages shall be assessed.

[In trespass against several defendants, though some plead to issue and are acquitted, yet damages shall be assessed against the defaulters. H. 12 G. 2. Str. 1108. H. 18 G. 2. Str. 1222.]

[In trespass against several, A. lets judgment go by default, B. demurs, and C. pleads not guilty; and it comes on to assess damages against A., contingent damages against B., and for trial as to C., who is acquitted: several damages may be assessed against A. and B. T. 13 G. 2. Str. 1140.]

{ In a joint action against several, if the jury sever the damages, the plaintiff may take judgment for the largest amount, without entering a *remittitur* as to the residue. *Dougherty v. Dorsey*, 4 Bibb, 208. }

So, if several causes of action are joined in one declaration against the same defendant, the damages may be severally assessed. Vide post, (E 6.)

And it is safest for the plaintiff: for, if for one cause an action does not lie, the plaintiff shall have his damages and costs for the other; and the judgment shall be reversed or arrested only for that part which has not a good cause of action. R. Cro. El. 537. R. 1 Rol. 24. R. Mo. 708.

As, in *ejectione custodiam terræ et hæredis*, if intire damages are given, it will be bad for the whole; because the action does not lie for the wardship of the heir. Dy. 369. b. Vide ante, (E 2.)—post, (E 6.)

In trespass *quare clausum fregit*, and for battery of his servant, without

saying, *per quod servitum amisit*, if intire damages are given, it will be bad for the whole. R. 10 Co. 130. b.

[If assault is well laid, and then *cumque etiam*, and another assault, and intire damages, it is ill. H. 11 G. Str. 621.]

[In battery, two counts, the first good, the second with a *cumque etiam*; and because damages were intire, judgment was arrested. P. 5 G. Fort. 376.]

[If A. and B. bring trespass for breaking and entering the house of [*]A., and taking the goods of A. and B., and intire damages given, it is ill. P. 11 G. 2 Ld. Raym. 1381.]

[In *assumpsit* to stand to an award, and not sue execution, and a breach assigned for both, and intire damages; if the award was void, it will be bad for the whole. R. 10 Co. 131.]

So, in an action for words alleged at several times, and the words at one time are not actionable. 1 Rol. 576. l. 20. Per Popham, Cro. El. 329. Cro. Car. 328. 1 Lev. 134.

So, in covenant, *assumpsit*, &c. if the breach be for not surrendering land and giving an obligation, and intire damages; where the breach in not giving the obligation is null. R. 2 Cro. 115.

So, in an action upon the case, if the plaintiff prescribes for honey, wax, dead wood, goods of felons, &c. and intire damages are given, where for some of the things the prescription is bad; judgment shall be stayed for the whole. R. Mo. 707. Cro. El. 560.

So, if the plaintiff entitles himself to a mill by a lease 9 Jac., and assigns a breach for not grinding from 2 Jac. to the 12 Jac., and general damages are given; the plaintiff shall not recover for any part. R. Mo. 887.

So, in an action upon the case, if the plaintiff charges the inveigling away his apprentice, by which he lost his service for the residue of the term, which is not yet expired, and the jury give damages generally; it will be bad for the whole. R. 2 Sand. 171.

So, in covenant, if several breaches are assigned, and intire damages; if any breach be insufficient, it will be bad for the whole. R. 1 Sand. 154.

So, intire damages *de incremento* given by the court are void for the whole, if the action does not lie for part. R. Mo. 708.

[In action for words, some whereof not actionable; if damages intire, plaintiff shall have new *venire facias*, that they may be severed. Barnes, 478. 480.]

(E 6.) When not.

But where there is a joint cause of action against divers persons, damages ought not to be assessed severally; and if they are, a *venire facias de novo* shall go: as, in trespass against several, if they be all found guilty of the same trespass. R. 11 Co. 5. b. Heydon. Carth. 20.

[If two defendants in trespass suffer judgment by default, and the plaintiff execute writs of enquiry against them separately, and take several damages against them, it is irregular; and if the plaintiff enter up final judgment, with those several damages, it is erroneous; but the court will permit the plaintiff to set aside his own proceedings before final judgment on payment of costs. B. R. H. 35 Geo. 3. 6 T. R. 199.]

[If two defendants confess the trespass, the damages cannot be severed; and if severed, judgment shall be arrested. P. 7 G. Str. 422.]

Or, though they plead severally. 11 Co. 5. b. R. 2 Cro. 384.

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Or, one pleads not guilty, and the other justifies. R. Cro. El. 860. R. 2 Cro. 118.

Or, if the declaration be against A. *simul cum* B., and against B. *simul cum* A. R. 2 Cro. 348.

So, if one, to trespass for assault, battery, imprisonment, and taking of goods, pleads not guilty to the whole, and the other to the assault [*]pleads *son assault*, and says nothing to the imprisonment or goods, and it is found for the plaintiff against both; damages shall be assessed generally for the whole; for the trespass being joint in the whole, and he who pleaded *son assault* being guilty for that, will be guilty of the whole. R. 3 Lev. 324.

[In an action against several for a malicious prosecution, damages cannot be assessed severally. T. 5 G. 2. Str. 910. Sed vide supra, (E 5.) contra.]

So, if a plaintiff joins several causes of action in the same declaration, against the same defendant, entire damages may be assessed: for it will be at the peril of the plaintiff if any cause is not sufficient, in which case, judgment shall be reversed for the whole; and the defendant has no prejudice: as, in assumpsit upon several promises. R. 1 Rol. 570. l. 12. 1 Rol. 423. 3 Bul. 258. { Vide *Buster v. Ruffner*, 5 Munf. 27. }

As, in ejectment, of the wardship *terræ et hæredis*, an entire damages; for it does not lie for the wardship of the heir. R. Dy. 369. b. Vide ante, (E 2. 5.) Vide infra.

So, in waste for several wastes in several places, entire damages may be assessed. R. 1 Rol. 569, l. 50. Cro. Car. 414.

And though in trespass, trover, &c. for goods, some are expressed insensibly, in English, or false Latin, and entire damages are assessed, it will be well; for the damages shall be intended to be all given for the other goods. R. 10 Co. 130. 133. b. Vide Courts, (P 9.)

So, in an action for words all spoken at the same time though some be not actionable, and entire damages assessed; they shall be all intended for the actionable words. R. 10 Co. 130. b. R. Mo. 142. 1 Rol. 576. l. 15. R. Cro. El. 329. 787. R. Cro. Car. 328.

So, if the defendant pleads to the words not actionable not guilty, and justifies for the others, and issue upon it; if entire damages are given, they shall be intended for the actionable words; for upon the whole matter it appears all the words were spoken at the same time. R. 1 Rol. 576. l. 25.

So, if words not actionable are of the same import with the former, and are alleged *ex ulteriori malitia*, and thereby refer to the former. R. Cro. Car. 327. Dub. Sho. 80.

[Where some counts in a declaration for slander are good and some bad in law, and general damages are given, the court will arrest the judgment in toto, and will not award a *venire de novo*. B. R. T. 36 Geo. 3. 6 T. R. 691.]

So, in *assumpsit* by an innkeeper against A. *pro hospit.* B. at his request, and that he found *pro hospitio præd.* such a sum, viz. so much *pro esculent.*, so much *pro poculent.*, so much for apparel; after verdict, damages shall not be intended *pro vestitu*, which it does not belong to an innkeeper to find. R. 2 Rol. 79.

So, if, in a breach assigned, some words are insensible, the damages shall not be intended for them. R. 2 Rol. 577. l. 35.

So, if the plaintiff charges for imprisonment 7 July, and that the defendant afterwards, viz. 2 June, (which was a time prior), menaced him, where-

by from the said 2 June *negotia intendere nequit*: the time after the viz. shall be rejected, and no damages intended for that. R. 1 Rol. 576. l. 40.

So, if the plaintiff assigns several breaches, and one is insensible [*] and insignificant, no damages shall be intended for that. R. 1 Rol. 577. l. 15.

Or, in covenant, where the plaintiff shews several covenants, and shews a breach only upon one; all the damages shall be intended for that on which the breach is assigned. R. 2 Rol. 178.

So, if entire damages are given, when an action does not lie for part, if the plaintiff releases his damages and costs, he shall have judgment for the part which is good; as, in ejectment of ward of the land and heir, where it does not lie for the heir. Dy. 370. a. Vide ante, (E 2. 5.) Vide supra.

In replevin, if the avowant has a verdict, which gives damages for the whole rent, when he was entitled only to two-thirds; he shall have judgment *pro retorno habendo*, if he releases his damages. R. Mo. 281.

In an action on the case, if the defendant pleads not guilty to part, and justifies for part in another county, upon which there is a mistrial as to one issue; if the plaintiff releases his damages as to that, it is sufficient. R. 2 Cro. 127.

So, if several damages are given, and entire costs, and the plaintiff has judgment only for part; he shall have entire costs. Hob. 6. Vide Costs, (A 1, &c.)

[If there is an issue to one count, and demurrer to another, and plaintiff is nonsuited on the issue, damages cannot be assessed on the demurrer. H. 8 G. Str. 507.]

(E 7.) Damages increased, &c.

When increased upon view of a mayhem. Vide Battery, (E 3.)

Damages may be increased by the court, where the principal demand is certain: as, in account. 10 H. 6. 24. b.

In debt upon an obligation, where the deed is denied. 1 Rol. 572. l. 27.

So, if the plea be sent to be tried in a foreign county; for the jury there have not full knowledge of the fact. 1 Rol. 572. l. 50.

So, where the court can assess damages without a writ of inquiry, they may increase them after a writ of inquiry upon a demurrer, or judgment by default. R. 1 Rol. 573. l. 5.

So, the court may increase damages upon the view of any justice of the court *en pais*. 1 Rol. 572. l. 22.

And where the court can increase, they may mitigate damages. 1 Rol. 572. l. 25. 28. 573, l. 7.

But the court cannot increase damages, where the damages are the principal, and the court has not certain knowledge of the cause by the record, or other apparent matter: as, in an action for slander, though the defendant justifies. 1 Rol. 572. l. 3.

In trespass for trees cut. 1 Rol. 572. l. 30. 1 Brownl. 201.

So, justices of nisi prius cannot increase damages. 1 Rol. 573. l. 30.

Nor, the court upon the certificate of justices of nisi prius. 1 Rol. 572. l. 20.

[In debt upon recognizance, bail in error in the exchequer-chamber are not liable to pay interest on the judgment between the signing of the judgment in B. R. and the affirmance of it in C. S. But as to the interest due subsequent to the time of the affirmance, that stands on a different ground. B. R. M. 28 Geo. 3. 2 T. R. 57.]

[In debt on a judgment affirmed in error, the jury by way of damages [*370]

[*]may give interest upon the sum recovered by the judgment from the time of signing it, where by the practice of the court in which error is brought, such interest is not allowed in costs upon the affirmance. B. R. M. 28 Geo. 3. 2 T. R. 78.

[*Excessive.*—If the jury find a verdict for a sum certain, according to a calculation which does not warrant the amount, it is a ground for a new trial. 1 Price, 369.]

[In trespass for breaking and entering the plaintiff's closes, and sporting there under circumstances of aggravation, the jury gave 500*l.* damages, which the court refused to reduce, though no pecuniary damage had been sustained. 1 Mars. 139. 5 Taunt. 442.]

[In an action for not removing tithes, the court refused to grant a new trial, though damages amounted to 150*l.* on a farm of less than 100 acres. Wightw. 113.]

[The court will not interfere to disturb a recorded verdict, on the affidavit of one of the jury, that the amount of the damages taken exceeded what they had intended to have given. 1 Price, 1.]

[The court may, in any case, set aside a verdict or inquisition, and grant a new trial or inquiry, upon the ground of excessive damages. 1 T. R. 277. 2 Blk. 942. 2 Blk. 1327. Cowp. 230. 4 T. R. 651. Id. 659. 5 T. R. 257. 7 T. R. 529. 3 Anst. 808. Lofft. 28. Lofft. 771.]

{ But it seems, that in certain cases, as in actions for violent assaults and for slander, &c. new trials will not be granted for excessive damages unless they are far beyond the bounds of moderation. Chancellor *v.* Vaughan, 2 Bay, 416. Neal *v.* Lewis, 2 Bay, 204. Coffin *v.* Coffin, 4 Mass. Rep. 41. Coleman *v.* Southwick, 9 Johns. Rep. 45. Southwick *v.* Stevens, 10 Johns. Rep. 443. Woert *v.* Jenkins, 14 Johns. Rep. 352. Craig *v.* Elliot, 4 Bibb, 272. Respass *v.* Parmer, 2 Marsh, 365. M'Dowell *v.* Murdock, 1 Nott & M'Cord, 237. Davis *v.* Davis, 2 Nott & M'Cord, 81. Lloyd *v.* Monpoey, 2 Nott & M'Cord, 446. }

[Where a new trial is granted on account of excessive damages, the court will direct that the first verdict stand as security. 7 T. R. 529.]

[*Deficiency in.*—It is a general rule that the court will not set aside a verdict in an action for a personal injury, on account of the smallness of the damages, unless they arose from a mistake in law. Dougl. 509.] { Vide Bacot *v.* Keith, 2 Bay, 466. Shackford *v.* Goodwin, 13 Mass. Rep. 187. }

[*Application and apportionment of.*—Where there are entire damages on several counts, some of which are bad in law, it is error. Dougl. 377. 730.] { Vide Hamilton *v.* Dent, 1 Hayw. 116. }

[If in one count two causes of complaint are alleged, one of which is actionable, the other not, and the jury give a general verdict for the plaintiff, it will be presumed, that under the judge's direction, the damages were given for the valid cause of action only. 1 T. R. 508. { Vide Hamilton *v.* Dent, 1 Hayw. 116. }

[If, in an inferior court, damages are assessed generally upon all the counts of a declaration, some of which are bad, the judgment thereon will be reversed altogether. For—1. There are no means of apportioning the damages, and thus of affirming the judgment as to so much upon the valid counts, and reserving it as to others.—2. The court of error cannot affirm the judgment as to the valid counts, and award a *venire de novo* to assess damages thereon. 1 T. R. 151.]

[If in an action for damages, two things are demanded in separate counts, to one of which the plaintiff has no title, and damages are assessed upon

each count separately ; judgment may be entered for the damages assessed for the valid cause of action, or if taken for both, will be reversed as to the other only. 3 T. R. 433.]

[*Mitigation of.*—Where matter amounting to a complete defence must be specially pleaded, it is inadmissible in evidence as in mitigation of damages. 2 B. & P. 224.]

[*](E 8.) Defect in assessing aided by release.

So, where damages are not the only thing to be recovered, the plaintiff may supply a defect in the assessment of the damages, by his release of the damages ; as, in debt, annuity, &c. 11 Co. 56. a.

So, where more damages are assessed than the declaration mentions, the plaintiff may aid it by a release of so much as exceeds the declaration. Semb. Ow. 45. R. Yel. 45.

So, if in a joint action of trespass, &c. several damages are assessed ; it shall be aided by a release, or *nolle prosequi* against all but one defendant. R. Carth. 21.

So, if it be doubtful whether damages can be given, he may release the damages, and not the costs. 2 Rol. 75.

And release of the damages may be at any time before judgment. Ibid.

But if the jury do not assess damages, where damages only are recoverable, it cannot be aided by a release. Vide Ante, (E 1.)

So, a default in assessment of damages cannot be supplied by a writ of inquiry : for then the defendant will lose the benefit of an attain, if they are excessive. Vide Pleader, (Z 1, &c.) Vide ante, (E 1.)

Vide Pleader, (S 25.)

DARREIN PRESENTMENT.

Vide QUARE IMPEDIT, (C 1, &c.)—ABATEMENT, (H 26.)

DARREIN SEISIN.

Vide SEISIN.—ABATEMENT, (H 25.)

DATE.

Vide FAIT, (B 3.)

DAY.

Vide ANN, (C.)

DIES DOMINICUS. Vide TEMPS, (B 3.)

DIES JURIDICI. Vide TEMPS, (C 1, &c.)

YEAR AND DAY. Vide TEMPS, (B 1.)

YEAR, DAY, AND WASTE. Vide ANN, JOUR, and WASTE.

COMPERUIT AD DIEM. Vide PLEADER, (2 W. 31.)

SOLBIT AD DIEM. Vide PLEADER, (2 W. 29.)

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[*]DEAN AND CHAPTER.

Vide ECCLESIASTICAL PERSONS, (C 3.)

DEATH.

DEATH OF THE INCUMBENT. Vide ESGLISE, (N 1.)

—OF JUSTICES. Vide ABATEMENT, (H 39.)

—OF THE KING. Vide ABATEMENT, (H 38.)—JUSTICES OF PEACE, (A 8.)—OFFICER, (K 10.)

—OF A PARTY. Vide ABATEMENT, (E 17.—H 32, &c.)—BAIL, (Q 5.—R 5.)

—OF A STRANGER. Vide ABATEMENT, (H 36.)

—OF A TESTATOR. Vide CHANCERY, (3 Y 17.)—DEVISE, (N 21.)

—OF A VOUCHER. Vide ABATEMENT, (H 37.)

DYING SEIZED. Vide DISCENT, (D 2, 3, 4.)

DEBT.

Vide DETT.

DECEIPT.

Vide ACTION UPON THE CASE FOR A DECEIPT.—CHANCERY, (3 F. 1, 2.)

—(3 M. 1, &c.—3 N. 1.—4 D. 3.—4 H. 4.—4 L. 1.—4 O. 2.)—COVIN.

—JUSTICES OF PEACE, (B. 30, &c.)—LEET, (L 6, &c.)—PARLIAMENT, (L 38.)—PLEADER, (2 H.)

WRIT OF DECEIT. Vide ANCIENT DEMESNE, (E 2.)

DECIES TANTUM.

Vide ENQUEST, (F)—PLEADER, (S 46.)

DECLARATION.

DECLARATION IN PLEADING. Vide COUNT.

DECLARATION OF USES. Vide USES, (D 1, &c.)

DECREE.

Vide CHANCERY, (Y 1, &c. and other places in the same title.)—EVIDENCE, (C 1.)—SEWERS, (H 1, &c.)—USES, (N 20, &c.)

[*]DEDIMUS POTESSTATEM.

Vide CHANCERY, (K 3.—P 2, &c.)—FINE, (E 7.)

DEED.

Vide FAIT.

DEFEAZANCE. DEER-STEALING.

Vide JUSTICES OF PEACE, (B. 47.)

DEFAMATION.

Vide ACTION UPON THE CASE FOR DEFAMATION.—LIBEL.—PLEADER,
(2 L 1, &c.)—PROHIBITION, (G 14.)

DEFAULT.

Vide ABATEMENT, (H 52.—I 27.)—ENQUEST, (E).—JUSTICES OF PEACE,
(B 101.)—PLEADER, (B 11, 12.)—(E 42.—Y 1. — 3 L. 8.—3 M. 28.)
—REMITTER, (C 5.)

DEFEAZANCE.

(A) WHAT SHALL BE. p. 374.

(B) WHEN IT SHALL BE GOOD.

(B 1.) Of a thing executory. p. 375.

(B 2.) Of a thing executed. p. 375.

(C) WHEN IT SHALL NOT BE GOOD. p. 375.

(A) WHAT SHALL BE.

A defeazance is an instrument which defeats the force or operation of some other deed, or estate. And that which in the same deed is called a condition, in another deed is a defeazance.

As, if a man covenants or grants that upon payment of a less sum at such a day, an obligation, recognizance, &c. shall be void. R. Cro. El. 623.

If a defeazance be absolute and perpetual, it amounts to a release. Per Holt. Sho. 46. Carth. 64. Vide Pleader, (2 V 12.—2 W 35. 37.)

[*]So, a licence, that he shall not be sued upon such an obligation, &c. amounts to a defeazance. Carth. 64.

[One deed may amount to a defeazance of another without express words of relation. C. P. T. 11 & 12 Geo. 2. Willes, 107. Com. 568. S. C.]

(B) WHEN IT SHALL BE GOOD.

(B 1.) Of a thing executory.

Things executory may be defeated by a defeazance made at the same time, or at any subsequent time. Co. L. 236. b.

As a recognizance, statute, obligation, &c. may be defeated by a defeazance at a subsequent day, as well as upon the same day. Co. L. 237. a. Adm. Cro. El. 755. R. cont. per three J. but Sand. acc. 2 Sand. 48. Acc. Mo. 811. R. Cro. El. 623.

So, rents, annuity, warranty, &c. Co. L. 237. a.

So, a power of revocation. 1 Co. 113. a.

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So, a defeazance, that a statute shall not be extended, as to lands in A. is good. R. Mo. 811.

If a defeazance be made of a prior defeazance, the first shall be thereby defeated; as, a devise by any subsequent devise. 1 Rol. 590. l. 45.

(B 2.) Of a thing executed.

So, inheritances, and things executed, may be defeated by a defeazance made at the same time. Co. L. 236. b.

So, an obligation, &c. may be defeated by defeazance after the condition broken as well as before. R. Carth. 64.

(C) WHEN IT SHALL NOT BE GOOD.

But a thing executed cannot be defeated by a defeazance at a subsequent time: as, a feoffment cannot be defeated by a defeazance at a future day. Co. L. 236. b. Fitz. Condition, 18.

Nor, a release to a disseisor; for it is executed immediately. Co. L. 236. b.

So, if a thing, executory in its commencement, be executed, a defeazance afterwards is too late: as, if a debt be assigned to the king, if the barons of the exchequer allow it; if the king sues execution, disallowance afterwards by the barons is too late, for the debt was executed by the assignment. 5 Co. 90. b.

So, a defeazance ought to be by matter as high as the thing which will be defeated: and, therefore, if an obligation be to pay, at such a day, an agreement, *per scriptum manu sua signatum*, to give time to a future day, is not sufficient; for it ought to be by deed. R. 3 Lev. 234.

So, a writing shall not be construed as a defeazance, without a necessity: as, if A. covenants to pay B. 5s. a week, and 100l. at his death, and B. by another deed of the same date, reciting the former, covenants to save A. indemnified from all debts and securities before made, or afterwards to be made by him: it shall not be construed a defeazance of the covenant of A. R. Sal. 573.

So, if it be said, that he shall be indemnified from the covenant; if it be not added, that the covenant shall be void. R. Sal. 575.

[*]DEFENCE.

Vide ABATEMENT, (I 16.)—PLEADER, (E 27.—3 M 17.)

DE INJURIA SUA PROPRIA.

Vide PLEADER, (F 18, &c.)

DELEGATES.

Vide ADMIRALTY, (G)—PREROGATIVE, (D 14.)

DELIVERANCE.

SECOND DELIVERANCE. Vide PLEADER, (3 K 4.)

DELIVERY.

Vide FAIT, (A 3, 4.—B 5.)—PLEADER, (2 X 6.)

DEMAND.

Vide RELEASE, (E 1.)—RENT, (D 3, &c.)

DEMISE.

Vide ABATEMENT, (H 28, 49.)—BARON AND FEME, (G 3.)—ESTATES, (B 32.)
—PLEADER, (2 W. 14, 47, 48.—2 Z 2.—3 O 18.)

DEMURRER.

Vide CHANCERY, (H 1, 2.)—PLEADER, (Q 1, &c.—2 V 3.—2 W 42.)—
BAIL, (R 7.)
PAROL DEMURRING. Vide ENFANT, (D 1, 2.)

DENIZEN.

Vide ALIEN, (D 1, &c.)

DEODAND.

Vide WAIFE, (E 1, 2.)

[*]DEPARTURE.

Vide PLEADER, (F 7, &c.)

DÉPOSIT.

Vide CHANCERY, (Y 5.)

DEPOSITION.

Vide CHANCERY, (P 8.—T 4, 5.)—EVIDENCE, (C 4.)

DEPRIVATION.

Vide PREROGATIVE, (D 21, 22.)—ABATEMENT, (H 46.)

DEPUTY.

Vide OFFICER, (D 1, &c.—VISCOUNT, (B 1, &c.)

DERELICT LANDS.

Vide PREROGATIVE, (D 61, 62.)

DESCENT.

Vide DISCENT.

DE SON ASSAULT.

Vide PLEADER, (3 M 15.)

DE SON TORT DE MENSE.

Vide PLEADER, (F 18, &c.)

DETAINDER FORCIBLE.

Vide FORCIBLE ENTRY.

[*] DETERMINATION.

DETERMINATION OF THE AUTHORITY OF JUSTICES OF PEACE. Vide JUSTICES OF PEACE, (A 8.)

DETERMINATION OF AN ESTOPPEL. Vide ESTOPPEL, (F)

———— OF A LEASE FOR YEARS. Vide ESTATES, (G 10, 11, 12.)

———— OF MILL. Vide ESTATES, (H 6, &c.)

DETINUE.

(A) WHEN IT LIES. p. 378.

(B) FOR WHAT THINGS IT LIES. p. 378.

(C) FOR WHAT NOT. p. 379.

(D) WHEN IT DOES NOT LIE. p. 379.

(A) WHEN IT LIES.

Detinue lies by him who has property in a thing certain, against him who detains it; upon which the plaintiff shall recover the thing detained in specie. Co. L. 296. b. F. N. B. 138. A. E.

{ The declaration must allege either property or possession, in the plaintiff. Morton v. Israel, 3 Bibb, 517. Vide Burnley v. Lambert, 1 Wash. 308. }

So, it lies by him who has only a special property; as, by a bailee of goods. Bro. Detinue, 20.

So, it lies if the plaintiff has a property, though he never had possession; and therefore the heir may maintain detinue for an heir-loom. Bro. Detinue, 30. 45. { Vide Tunstall v. M'Clelland, 1 Bibb, 186. M'Dowall v. Hall, 2 Bibb, 610. Fowler v. Lee, 4 Munf. 373. }

If a statute says, that goods imported shall be forfeited, part to the king, and part to him who will seize or sue for them; a subject may have detinue for his part of the goods, for the action vests the property in him. R. 1 Sal. 223. 5 Mod. 193.

So, it lies, though the defendant came to the possession of the goods by bailment, or by trover. F. N. B. 138. Co. L. 286. b.

If husband and wife be divorced, detinue lies by the wife for goods given with her in frank marriage. F. N. B. 139. A.

So, it lies, though the defendant quitted the possession before the action brought by delivery of the goods to another. Bro. Detinue, 1, 2. 33, 34. 40.

[So, for goods lost and found, as well as for goods delivered. C. P. M. 12 Geo. 2. Willes, 118.]

{ But it will not lie by one joint tenant or tenant in common, against another. Carlyle v. Patterson, 3 Bibb, 93. *ut semb.* }

(B) FOR WHAT THINGS IT LIES.

Detinue lies for money or goods so certainly described that they may be known: as, for money in a chest or bag. 1 Rol. 606. l. 12. 14.

For particular pieces of silver, or of gold. R. 1 Rol. 606. l. 25.

Or, so many ounces of silver, or of gold. R. Yel. 81.

{ Or, for an infant negro, naming the mother, without any other description. Bass v. Bass, 4 Hen. & Munf. 473. Vide Holliday v. Littlepage, 2 Munf. 539. }

[*]So, for money taken in the view of another, though it was not in a bag. 1 Rol. 606. l. 16.

So, it lies for twenty quarters of wheat. Bro. Detinue, 51.

(C) FOR WHAT NOT.

But detinue does not lie for money at large; for one piece cannot be known from another. Co. El. 286. R. Cro. El. 457.

Nor, for wheat out of a sack or bag. Co. L. 286.

{ Nor for a horse, without any further description. Boggs v. Newton, 2 Bibb, 221. }

So, it does not lie for an hawk, or other thing of pleasure, though re claimed.

So, it does not lie *de una domo vocata* a bee house. R. 2 Cro. 39.

(D) WHEN IT DOES NOT LIE.

And detinue does not lie, if the plaintiff has not the general or special property at the time of the action; as, if the defendant took the goods as a trespasser; for by the trespass the property of the plaintiff is divested. Per Brian, 6 H. 7. 9. a.

So, if A. bails goods to B. and afterwards gives them to C., C. shall not have detinue against B. who had a special property by the bailment. Mod. Ca. 216.

So, it does not lie against him who never had the goods; and therefore, it does not lie against an executor upon a bailment to his testator, if the goods never came to the possession of the executor. Bro. Detinue, 19.

So, it does not lie, if the goods never were detained, by the fault of the plaintiff: as, if the defendant finds goods, and before demand, loses them by accident. Semb. Bro. Detinue, 1. 33. 40.

DETINUE OF CHARTERS. Vide CHARTERS, (B 1, &c.)—PLEADER, (2 X 1, &c.—2 Y 6.)

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PLEADING IN DETINUE. Vide **PLEADER**, (2 X 1, &c.)
NIL DETINET. Vide **PLEADER**, (2 W 44.—2 X 3.)

DETT.**(A) WHEN IT LIES.**

- (A 1.) Upon an act of parliament. p. 380.
- (A 2.) Upon a judgment. p. 381.
- (A 3.) Upon a statute, or recognizance. p. 382.
- (A 4.) Upon other specialty. p. 382.
- (A 5.) Debt for rent. p. 383.
- (A 6.) Debt for an annuity. p. 384.
- (A 7.) When it does not lie. p. 384.
- (A 8.) Debt upon contract.—Express. p. 385.
- (A 9.) Implied. p. 386.

(B) WHEN DEBT DOES NOT LIE. p. 387.**[*](C) BY WHOM DEBT LIES. p. 388.****(D) BY WHOM NOT. p. 389.****(E) AGAINST WHOM DEBT LIES. p. 390.****(F) AGAINST WHOM NOT. p. 391.****(G) DEBT TO THE KING.**

- (G 1.) By what means accrued. p. 391.
- (G 2.) By what means satisfied.—By the body of the debtor. p. 393.
- (G 3.) By his goods. p. 393.
- (G 4.) Or lands. p. 393.
- (G 5.) In the hands of the heir. p. 394.
- (G 6.) In the hands of a stranger. p. 394.
- (G 7.) By the goods of a stranger. p. 395.
- (G 8.) The king shall be preferred. p. 397.
- (G 9.) How execution for the king relates. p. 399.
- (G 10.) Who are not liable for the king's debt. p. 399.
- (G 11.) Suit for the king's debt.—In what court it shall be. p. 400.
- (G 12.) How he shall sue. p. 400.
- (G 13.) When the suit shall be barred. p. 400.
- (G 14.) How the trial shall be. p. 401.

(G 15.) How the proceedings shall be for a debt assigned to the king. p. 401.

(A) WHEN IT LIES.

(A 1.) Upon an act of parliament.

Debt lies upon every contract in deed, or in law.

As, if an act of parliament gives a penalty, and does not say to whom nor by what action it shall be recovered; an action of debt lies upon such statute by the party grieved: as, upon the st. 14 H. 8. 5. that every practiser of physic in London without licence shall forfeit 5*l.* a month, a moiety to the king, a moiety to the college of physicians. R. 1 Rol. 598. l. 25.

{ Debt will lie to recover damages given by a publick statute, which are reduced to a sum certain by the provisions of the statute, when no other remedy is given. *Bigelow v. Cambridge and Concord Turnpike Corporation*, 7 Mass. Rep. 202. *Jeffrey v. The Blue-Hill Turnpike Corporation*, 10 Mass. Rep. 368.

But if a different remedy is provided, it must be pursued. *Gedney v. The Inhabitants of Tewksbury*, 3 Mass. Rep. 307. *Smith v. Drew*, 5 Mass. Rep. 514.

In debt under the statute against gaming, by the losing party against the winner, the count may be general; *secus*, if the action be brought by a common informer. *Collins v. Ragrew*, 15 Johns. Rep. 5. }

Upon the st. 2 & 3 Ed. 6. 13. which gives the treble value for not setting out of tithes. R. 1 Rol. 598. l. 30. 2 Inst. 650.

Upon the st. 28 El. 4. which says, the sheriff shall take for his fees no more than 12*d.* for every 20*s.* under 100*l.*, and 6*d.* for every 20*s.* above 100*l.*, the sheriff shall have debt for his fees. R. 1 Rol. 598. l. 35. Mo. 853. 1 Sal. 209. Latch, 17. 51. Vide Viscount, (F 2.) (Vide 1 Sal. 331.)

So, for a sum of money payable upon a demise out of land. Per Holt, Sal. 415. Mod. Ca. 26.

Vide Action upon Statute, (E 1, 2.—F.) Vide post, (A 5. 9.)

[*](A 2.) Upon a judgment.

So, debt lies upon a judgment, within or after the year after recovery. 43 Ed. 3. 2. b.

Upon a judgment for debt or damages in a court of London by special custom, debt lies in B. R. or C. B., though the original action could not have been brought there. R. 1 Rol. 600. l. 45.

So, it lies there upon a judgment in an inferior court, removed thither by error, or certiorari. Hut. 118. R. 1 Lev. 134.

[So, it lies on a judgment given in a foreign court; and it is not necessary to state the grounds of that judgment in the declaration. Doug. 1 to 7.]

{ Vide *Sterne v. Spalding*, Kirby, 177. *Hubbell v. Cowdrey*, 5 Johns. Rep. 132. *Andrews v. Montgomery*, 19 Johns. Rep. 162.

So on a decree of a court of chancery in a sister state, for the payment of money only, and no act is to be done by the plaintiff. *Post v. Neafie*, 3 Caines' Rep. 22.

But debt will not lie where the court has no jurisdiction of the original suit, and where the defendant has no opportunity to contest the claim. Kibbe

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v. Kibbe, Kirby, 126. *Kilburn v. Woodworth*, 5 Johns. Rep. 37. *Robison v. Ward's Ex'rs.* 8 Johns. Rep. 67. 2d edit. }

[But the grounds of the judgment may be shewn and impeached by the defendant, for judgments of foreign courts have not that credit shewn to them as judgments in our own courts of record, and they may be examined. Doug. 6.]

[So, it would seem, it would lie in the courts of Ireland on a judgment here, for the same principle applies to this case as to the former. But *Semb. contra.* 2 Str. 1090.]

So, it lies for damages recovered in a real action; for, by the judgment, they are reduced to a personalty. 1 Rol. 600. l. 25. 37.

For damages recovered in waste. 43 Ed. 3. 2.

For arrearages recovered in account. 1 Rol. 600. l. 40.

For damages recovered in right close, in antient demesne. 8 Ed. 4. 6. a.

So, debt lies upon a judgment on a recognizance against bail. R. 1 Rol. 600. l. 5. 2 Leo. 14.

Upon a judgment in *scire facias*. 3 Mod. 188.

So, it lies in C. B. upon a judgment in *scire facias* upon a recognizance in B. R. Dy. 306. a. in marg.

Debt lies in B. R. upon a judgment in C. B. removed thither by error. *Semb.* 1 Sid. 236.

So, it lies there upon a judgment there after error brought in the exchequer. R. 1 Sid. 236. Lut. 602. 1 Lev. 153. Ray. 100.

Or, after error depending in parliament; for only the transcript of the record is removed. 1 Sid. 236.

So, it lies in the marshalsea, or other court of record, upon a judgment in C. B. or B. R. R. 1 Sal. 209.

So, it lies in C. B. upon a judgment there, affirmed upon error in B. R. Co. Ent. 153.

[So, it lies in B. R. or C. B. on a judgment of nonsuit in an inferior court. 1 Wils. 316.]

But debt does not lie upon a judgment for the arrearages of an annuity, rent service, &c. for the freehold is continuing. 43 Ed. 3. 2. 1 Rol. 600. l. 32. Vide post, (B).

Nor, for damages recovered in a court baron in dower by the stat. of Merton, 1. 4 Co. 30. b. 1 Rol. 600. l. 50.

Nor, does it lie upon a judgment, after execution sued by *elegit*, or otherwise; for he has chosen another remedy. Vide 1 Rol. 601. Vide Execution, (C 14.)

[Nor after defendant taken on *ca. sa.* and discharged by plaintiff's consent. M. 10 G. 3. 4 B. M. 2482.]

[*] Though the defendant, taken in execution, escapes. 1 Rol. 601. l. 32.

Though the *elegit* be not returned, or the plaintiff disagrees to the return. Dy. 299. b. 1 Rol. 601. l. 25.

{ But where lands are extended, and the return is so defective that no estate passes, the judgment remains in force, and debt will lie upon it. Tate *v. Anderson*, 9 Mass. Rep. 92. }

Nor, does it lie, if after judgment the cause is referred, and a *dimittitur* entered upon the roll. 1 Rol. 601. l. 30.

Or, the record be removed by error. *Semb.* 2 Vent. 261. if the plaintiff does not declare upon the special matter; for then it lies. R. 3 Lev. 397. R. cont. where only a transcript of the record is removed. 1 Lev. 153.

Vide Pleader, (2 W 36, &c.)

(A 3.) Upon a statute, or recognizance.

So, debt lies upon a statute-merchant ; for it is in the nature of an obligation, and has the seal of the party. 1 Rol. 599. l. 40.

And upon a recognizance in the nature of a statute-staple. Dub. 1 Rol. 599. l. 50. 1 Leo. 52.

So, upon a recognizance before the mayor of London, &c. Dy. 219. 1 Leo. 284.

Upon a recognizance in chancery. Dy. 369. b. 306. a. Cro. El. 608. 1 Ver. 313. ; but it ought to be sued by *scire facias* in chancery.

So, it lies in B. R. upon a recognizance against bail in C. B. Mod. Ca. 132.

Or, upon a recognizance by bail in the same court. Mod. Ca. 159. R. Trin. 13 Ann. in C. B. Vide infra.

So, debt lies upon a recognizance, though he had judgment before in a *scire facias* upon the same recognizance, which stands in force. R. Cro. El. 608. 817. [Vide infra contra.]

{ So it lies in behalf of the Commonwealth, on a recognizance. Commonwealth v. Green, 12 Mass. Rep. 1. }

So, upon a writing designed to be a statute-staple, but not executed pursuant to the statute. R. Cro. El. 233. 494. Vide Statute-staple, (A).

But debt does not lie upon a statute-staple ; for the seal of the party is not affixed. 1 Rol. 599. l. 45. Cont. Semb. Ast. Ent. 223. 237.

So, it does not lie upon a recognizance by bail in B. R., for the bail will be ousted of the advantage of rendering the body before the return of the second *scire facias*, &c. Cont. 1 Brownl. 65. R. acc. Ray. 14. Cont. Mod. Ca. 132. 159. Vide Bail, (R 1. 9.) Vide supra.

Nor, (as it seems) upon a recognizance by bail in C. B. Cont. 1 Rol. 600. l. 15. R. cont. in C. B. Trin. 13. Ann.

So, it does not lie upon a recognizance, after judgment upon it in a *scire facias*. 1 Rol. 601. l. 15. 20. [Vide supra contra.]

(A 4.) Upon other specialty.

So, debt lies upon an obligation, or any other deed or specialty.

As, if a man by obligation, or other deed, acknowledges that he has received money from A. *ad computandum* ; A. may have debt upon it. 1 Rol. 597. l. 30.

Or, that he has so much of the money of A. in his hands. 1 Rol. 597. l. 47.

So, if he covenants to pay A. a certain sum, debt lies upon it.

Or, to pay his proportion of such a suit, with an averment that his proportion was so much. R. 3 Lev. 429.

So, debt lies upon a bill to pay 20*l.* for the true payment of 10*l.* R. 2 Vent. 106.

{ And it lies to recover the annual interest of money due by bond, before the principal becomes due. Sparks v. Garrigues, 1 Binn. 152.

So it will lie on a bond secured by mortgage. Williamson v. Andrew, 4 Har. & M'Hen. 482. }

[*]So, debt lies upon a tally against a teller, when money comes to his hands. 1 Rol. 599. l. 32.

[Upon a charter-party, which is a deed. P. 11 G. 2. Str. 1089.]

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(A 5.) Debt for rent.

So, if a lease be of lands or tenements for years or at will rendering rent; debt lies for the rent, by the common law. Lit. s. 58. 72. 1 Sid. 401.

So, if a lease be for years, or at will, of an incorporeal inheritance; as, an advowson, common tithes, fair, market, franchise, or office, &c. Co. L. 47. a.

So, debt lies, though the lease be rendering corn, or other collateral thing. R. 1 Rol. 591. l. 30. 4 Leo. 46. 3 Leo. 260.

So, if a lease be for life, after the estate of freehold determined, debt lies for arrears: as, if a lease be for life, or *pur autre vie*, and the lessee, or *cestuique vie* dies, debt lies for rent due at his death. 1 Rol. 596. l. 17. 20. Co. L. 162. a. 4 Co. 49. a.

So, if the lessor enters for a condition broken, or a forfeiture, debt lies for rent due before. 19 H. 6. 42. b. 1 Rol. 596. l. 40.

So, if he recovers for waste. 1 Rol. 596. l. 35.

So, if the lessee surrenders to him in the reversion. 4 Co. 49. a.

Or assigns to A. who surrenders. 4 Leo. 17, 8.

So, if there be a lease for life, feoffment, &c. rendering rent, for ten years, debt lies for it; for during the years, it is but a chattel. 1 Rol. 595. l. 10.

So, for rent upon a lease for years upon condition to have the fee, due before the condition performed. 1 Rol. 595. l. 15.

So, if rent be granted in fee for life, &c. with a *nomine pænæ*; debt lies for the *nomine pænæ*, though it goes to the heir along with the rent. Co. L. 162. b. 1 Rol. 595. l. 17.

So, by the st. 32 H. 8. 37. debt lies by an executor or administrator of any seised of a rent-service, charge, or seck, or of a fee-farm rent, in fee, in tail, or for life of another, against him that ought to pay the same, his executor or administrator.

A lease for life, or in tail, rendering rent; it is a rent-service within this statute. Co. L. 162. b.

So, it lies against any, who claim under him, that ought to pay, by purchase, devise, or descent. 2 Ver. 613. R. 1 Leo. 302.

{ So a devisee may maintain debt against the lessee, for arrears of rent which became due after the death of the testator. Mackubin v. Whetcroft, 4 Har. & M'Hen. 135. }

So, by the same statute, if a wife seised of a rent, &c. in fee, tail, or for life, dies, her husband shall have debt for the arrears due at her death.

And this, as well for arrears before the coverture, as after. Co. L. 162. b.

So, by the st. 29 Car. 2. 8. which gives remedy for augmentations to vicars, &c. by debt or distress, debt lies upon an augmentation of an annual payment reserved upon a lease for lives, during the continuance of the lives. R. 3 Lev. 83.

So, now by the st. 8. Ann. 14. though a lease for life be continuing, any person having rent due on any lease for life or lives, may bring debt for the same, in the same manner as if due on a lease for years.

Vide Rent, (D 3, &c.)

[*](A 6.) Debt for an annuity.

So, if an annuity be granted for years, debt lies for the arrears. R. Cro. El. 268. R. cont. Cro. El. 3. Dub. Cro. El. 895. Acc. 1 Bul. 151. D. cont. per Holt. 5 Mod. 143.

So, if it be granted for life, or *pur auter vie*; after the estate determined, debt lies for the arrears before. R. Goldsh. 30.

So, if the grantee of an annuity in fee leases for years; after the term expired, he shall have debt for the arrears during the term. 1 Rol. 597. l. 10.

So, if a parson, who has an annuity in right of his church, resigns or is deprived; he shall have debt for the arrears incurred before his resignation or deprivation. 19 H. 6. 41. b. 1 Rol. 595. l. 50.

So, if a parson dies, his executors shall have it. 4 Co. 49. a.

So, if a bishop had granted an annuity before the st. 1 El. 19. confirmed by the dean and chapter, and dies; debt lies against the successor for the arrears at his death. R. 1 Rol. 592. l. 20.

(A 7.) When it does not lie.

But by common law, debt does not lie for the arrears of a rent or annuity in fee, in tail, or for life, so long as the estate of freehold has continuance. 8 H. 6. 6. b. 1 Rol. 594. l. 55.

As, if the lord aliens his seignior in fee; debt does not lie for rent of his very tenant in arrear before the alienation. 19 H. 6. 42. b.

If a lessor, after a lease for life, grants the reversion; debt does not lie for the arrears, before the grant. 1 Rol. 595. l. 35.

If he enters upon the lessee, and detains until payment; he shall not, during his seizure, have debt for arrears before. 1 Rol. 596. l. 25.

If a lessee for life leases to A. for years, and then surrenders to his lessor upon condition, and A. surrenders to him and takes a new lease, and after the condition performed, the lessee for life re-enters, and ousts the lessee for years, who re-enters, he shall not have debt against A. for rent upon the first lease, for it was determined. R. Cro. El. 264.

So, if a rent or annuity, in fee, &c. be demised for years; the lessee shall not have debt during the term. R. 1 Rol. 595. l. 40. Semb. Cro. El. 895.

If a lessee for life of a rent, &c. acknowledges a statute, and afterwards releases to the terre-tenant, and then the conusee extends, the conusee shall not have debt for the rent, though his interest is but a chattel; for, as to him, the freehold, out of which it was derived, has continuance. R. 1 Rol. 596. l. 5.

So, an executor or administrator shall not have debt upon the st. 32 H. 8. 37. for the arrears of a rent-charge against the occupier; but it ought to be against the tenant of the land. Semb. Al. 62.

Nor against the issue in tail for arrears incurred in the life of his ancestor. R. 2 Ver. 613.

Nor, against the lord by escheat, or tenant in dower, or by the curtesy; for they do not claim merely by the party. 1 Leo. 302, 3.

[If an annuity is devised to a *feme covert*, on condition that she releases [*] all right and title, &c. and she dies without releasing, debt cannot be maintained for the arrears of the annuity. T. 8 & 9 G. 2 C. B. Fort. 188.]

(A 8.) Debt upon contract.—Express.

So, debt lies upon every express contract to pay a sum certain; as, if a man covenants or grants to pay. R. 1 Leo. 208.

[In some instances, it is not necessary to prove the exact sum laid in the declaration. Dougl. 6. 704.]

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So, if a man retains counsel for 40s. *per ann.* ; debt lies for the 40s. 37 H. 6. 8. b.

If he retains an attorney to prosecute a suit for him, *capiendo* 3s. 4d. per term for his fee besides expences ; debt lies for his fee. R. 2 Rol. 76. Vide Attorney, (B 18.)

So, if a solicitor or a stranger retains him for another. R. 1 Rol. 593. l. 51. 594. l. 10.

And it lies against him for whom he was retained, as well as against the retainer. R. 1 Rol. 593. l. 45.

So, it lies upon *concessit solvere*, according to the custom of London, Bristol, &c. R. 4 Leo. 105.

So, if a man pays the debt of B. at his request, to be repaid upon request ; debt lies for it against B., for it is a manifest contract between them. R. 1 Rol. 593. l. 25.

Or, delivers money to B. to be repaid at such a day. 1 Rol. 597. l. 50.

Or, to be safely kept. 1 Rol. 597. l. 51.

Or, to be B.'s money upon such a condition, otherwise to be redelivered. 41 Ed. 3. 10.

Or, to be paid to another ; and he does not pay it. Dy. 20. b.

Or, to be expended for his use ; and he does not expend it. R. Cro. El. 644.

So, if money be delivered to A. to be paid to B., debt lies by B. R. 2 Rol. 441.

So, debt lies though the contract be by way of a promise executory upon a good consideration ; as, upon a promise to pay 100*l.* upon the marriage of B. 1 Rol. 593. l. 10.

A promise to a physician, surgeon, &c. if he makes a cure. 1 Rol. 593. l. 15. 17.

Upon a promise to a carpenter, labourer, &c. if he builds or repairs an house, way, &c. 37 H. 6. 9. a. 17 Ed. 4. 5. a.

So, though the promise be for the advantage of a stranger : as, if a man promises to pay so much for the education of the child of another. R. Al. 6.

If he retains a tailor for 40s. to make a garment for his own daughter. 2 Rol. 77.

Or, for the servant of his daughter. R. Cro. El. 880.

So, it lies, if the sum be not certain, if it may be ascertained : as, upon an agreement to pay the debt of A. R. 2 Jon. 184. Dub. Cro. El. 758.

To pay a tailor *quantum meruit* for making garments, and finding necessities for them.

[It lies for that defendant bought goods for so much money as they should be worth, with an averment that they were worth so much. M. 1 G. Fort. 197.]

[*] To pay his proportion of the charge of a suit, with an averment that his proportion is so much. R. 3 Lev. 429.

To pay so much for the time his son had dieted with him ; where the father promised 8*l.* *per ann.* and died within the year. Cro. El. 756.

So, if a man in a tavern has wine, debt lies for it.

[Debt will lie wherever *indebitatus assumpsit* will. Dougl. 6.] { Vide United States v. Colt, 1 Peters' Rep. 149.

{ So it will lie against the indorser of a foreign bill of exchange protested. Stott v. Alexander, 1 Wash. 331.

But it seems, that it will not lie against the acceptor. Wilson v. Crowdhill, 2 Munf. 302, Smith v. Segar, 3 Hen. & Munf. 394. }

(A 9.) Implied.

So, debt lies, though there be only an implied contract: as, if a man be found in arrear upon account. 1 Rol. 598. l. 47.

Though the account be made before auditors.

If a bailiff pays more than he has received, debt lies for the surplus. R. 1 Rol. 598. l. 51.

So, debt lies for money awarded by an arbitrament. 2 Sand. 66. Vide Arbitrament, (I 1.)

So, by B. for money paid to A. for the use of B. 1 Rol. 597. l. 55. Yel. 23.

Though paid there for his use without his command. Semb. cont. 1 Rol. 597. l. 25.

So, debt lies for a *nomine pænæ*. 1 Leo. 110.

So, debt lies for the penalty of a bye-law, though it be not said by what action it shall be recovered. R. 1 Rol. 599. l. 25.

So, if by custom in a borough, the burgesses prescribe to choose a person to collect the lord's rents, and to pay 20s. *per ann.* for the profits of a market; debt lies by the lord for the 20s. 1 Rol. 595. l. 20. 597. l. 5.

So, debt lies for a fine, due by custom for a pound breach. 11 H. 7. 14. a. Hard. 486.

So, for customs due for merchandize, though the goods are forfeited for nonpayment. R. 1 Rol. 383.

So, for toll due by custom. Hard. 486.

So, for bar fees due to a gaoler. Ibid.

So, for every duty created by the common law, or by custom. Per Hale, Hard. 486.

So, debt lies for a pain or amerciament in a court-baron. 2 Sand. 66. R. 1 Leo. 203. Dub. Carth. 184.

So, for a fine assessed by a steward in a court-leet. R. Cro. El. 581. Vide Leet, (O 11.)

So, for a fine upon an admittance to a copyhold. 1 Sid. 58. 2 Mod. 230, 3 Mod. 240. Adm. Hard. 487. Vide Copyhold, (H 6.) [Vide Doug. 722—732.]

So, for a fine imposed for the refusal of an office. R. 3 Lev. 116.

So, for the profits of courts, reserved to the lord upon a grant of the manor. Mo. 870.

So, debt lies against a sheriff for money levied by him upon a *fieri facias*; for the law creates a contract for his paying. R. 1 Rol. 598. l. 10.

Though the writ be not returned. R. 1 Rol. 598. l. 15.

So, debt lies upon any statute, which gives an advantage to another, for the recovery of it: as, upon the st. 32 H. 8. 1. for money devised to be paid out of land. Per Holt, Mod. Ca. 26, Vide ante, (A 1.) Vide Action upon Statute, (E 1, &c.)

[*] For fees given by statute to a sheriff. R. Mo. 853.

For fees upon the execution of an *elegit*. 1 Sal. 209.

[One man cannot make himself the creditor of another, by paying, without his consent, a debt due from him to a third. The parishes of X. and Y., since their union under 22d & 23d Car. 2. c. 11. were in the habit of choosing a joint sexton for both parishes, at a salary to be paid equally by both. X. parish claimed the right of choosing a separate sexton for itself, which right it meant to try, by refusing to pay the sexton elected. A joint sexton was chosen as formerly; Y. parish paid him his full salary, and brought an

action against X. parish for the moiety. Held, that it would not lie. 1 T. R. 20.]

Vide Bye-law, (D 1.)

{ Debt will lie against a sheriff or gaoler for an escape of a prisoner committed in execution, for debt, whether the escape be negligent or voluntary. *Porter v. Sayward*, 7 Mass. Rep. 377. Vide *Rawson v. Dole*, 2 Johns. Rep. 454.

Debt for an escape will not lie, except where the debtor is in execution. Thus, where the escape happened after the surrender of the principal, by the bail, and before he was charged in execution, debt will not lie. An action on the case is the proper remedy. *Van Slyck v. Hogeboom*, 6 Johns. Rep. 270. Vide *Rawson v. Turner*, 4 Johns. Rep. 469.

So it will lie against the maker by payee of a promissory note at bank, who had taken it up to save his credit as indorser. *Bradford v. Ross*, 3 Bibb, 238.

So it will lie on an implied contract, though the sum be not certain, but dependant on something extrinsick. *United States v. Colt*, 1 Peters' Rep. 146. }

(B) WHEN DEBT DOES NOT LIE.

But debt does not regularly lie for a thing fallen, of which there is an estate of inheritance or freehold continuing: as, for arrears of rent, or annuity in fee, in tail, or for life. 4 Co. 49. Vide ante, (A 7.)

So, debt does not lie by the lord, for a relief. Co. L. 47. b.

Nor, for escuage. Ibid.

Nor, for *aide pur faire fitz chivaler ou file marrier*. Ibid.

So, debt does not lie for the arrears of a rent in fee, in tail, &c. though the estate be determined by act in law: as if rent be in arrear, and then the tenancy descends to the lord. 4 Co. 49. a. Vide ante, (A 7.)

And it did not lie by an executor or administrator, where his testator or intestate could not have it, until the st. 32 H. 8. 37. 4 Co. 49. a.

So, debt does not lie upon a judgment, recognizance, &c. when the party has chosen another remedy. Vide ante, (A 2, 3.)

So, debt does not lie upon an agreement by way of promise, where the consideration was executed: as to pay so much for service done, &c. 1 Rol. 594. l. 25. Vide Action upon the Case upon Assumpsit, (F 6.)

Though it was executed at his request: as, if in consideration of goods sold to A. at his request, he promises to pay if A. does not pay; debt does not lie, but *assumpsit*, for the contract was by the sale, to which he was not a party; and his request, without more, does not make him debtor. R. 1 Rol. 594. l. 30. Hard. 486.

So, if he makes such promise immediately after the sale; for it sounds in covenant. 1 Rol. 594. l. 35.

So, if he promises to A. to pay him 10s. per week, if he will serve his aunt; debt does not lie, for the service was not to himself; and so there wants a *quid pro quo*. Dy. 272. in marg.

So, if a man be at a common inn, debt does not lie for diet of him, his servants or horses, without some price agreed, or some contract. 3 Leo. 161.

So, if a man undertakes, that if A. will release his debt to B. he himself will be his debtor; debt does not lie. 9 H. 5. 14.

If a man demises for years, if a life so long lives, (without saying what life,

which is uncertain and void), at such a rent ; debt does not lie for the rent as a sum certain due by covenant. Skin. 570.

• So, if the property be not altered by the bailment, debt does not lie : as, if a man delivers money to B. in a bag unsealed, he cannot have debt for it. 1 Rol. 597. l. 20.

[*]So, debt does not lie upon an arbitrament for a collateral thing awarded. R. 1 Rol. 591. l. 32.

So, debt does not lie for arrearages found upon an account, where account does not lie for such thing. 1 Rol. 599. l. 2. 5.

{ Debt will not lie on a contract to pay a sum certain in a collateral article. Dorsey v. Lawrence, Hardin, 509. Watson v. M'Nairy, 1 Bibb, 356. Irvin v. Winn, 1 Bibb, 360. *in nota*. Bruner v. Kelsoe, 1 Bibb, 487. Mallox v. Craig, 2 Bibb, 584. Vide Campbell v. Weister, 1 Litt. 30.

Nor will it lie to recover back a horse lost at gaming. Bess v. Shepard, 2 Bibb, 225. Prior v. Lucas, 3 Bibb, 96.

Nor upon a writing acknowledging the receipt of personal property of a certain value. Thayer v. Campbell's Adm'r. 2 Bibb, 472. }

So, debt does not lie for the surplus, where a receiver pays more than he received : for he shall not have allowance as a bailiff. R. 1 Rol. 599. l. 20.

So, debt does not lie for the interest of money due upon a loan ; but he ought to have *assumpsit*. R. 1 Vent. 198. [B. R. E. 34 Geo. 3. 5 T. R. 553. Semb. contra.]

So, debt does not lie upon an agreement to pay first-fruits to the bishop ; for it is not within the consuance of the temporal courts. Co. L. 162. b.

So, debt does not lie upon a bill of exchange against the acceptor ; for the acceptance binds him by the custom of merchants, but does not raise a duty. R. Hard. 485. { Vide Wilson v. Crowdhill, 2 Munf. 302. Smith v. Segar, 3 Hen. & Munf. 394. }

So, it does not lie upon a note to pay, without a consideration ; though alleged that it binds by custom. R. Skin. 393.

[Debt lies by the payee against the maker of a promissory note expressed to be for value received. C. P. H. 40 Geo. 3. 2 Bos. & Pull. 78. B. R. M. 10 Ann, 10. Mod. 38. B. R. T. 11 Geo. 1. 8. Mod. 373. 2 Str. 680. s. c. contra, sed quære.]

So, debt does not lie for any part of a debt upon an entire contract : as, if a man by deed promises to pay 100*l.* *per ann.* to A. for collecting his rents, and dies after three quarters of a year expired, and within the year ; debt does not lie by A. for 75*l.* for his salary for the three quarters of a year. R. 1 Sal. 65. Vide post, (C 1.)

[So, where a man gave a note for the payment of 52*l.* 10*s.* by three instalments, and the payee brought debt upon it on the default of the maker upon the two first instalments ; the court held the action would not lie until after the last instalment became payable, and delivered a decided opinion against the action. 1 H. Bl. 547.]

[But upon a contract to pay several sums of money at distinct days, which is considered as different from a contract to pay a gross sum by instalments, though the difference is only formal, distinct actions of debt lie for the nonpayment of each sum. Semb. 1 Bl. 550.]

Vide ante, (A 2, 3. 7.)

(C) BY WHOM DEBT LIES.

In cases where debt lies, it is maintainable by the party to the contract,
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his executor, or administrator. By whom covenant lies, vide Covenant, (B 1, &c.)

So, sometimes the executor or administrator may have debt, where his testator could not have it: as, by the st. 32 H. 8. 37. by the executor, or administrator, of a man seised of a rent, fee-farm, &c. for arrears due at his death. Vide ante, (A 5.)

So, by the executor or administrator of the lord, for a relief due at his death. Co. L. 162. b. 11 H. 6. 15. a.

Or, for escuage; for it is a fruit fallen, and goes to the executor.

So, for *aide*, due at his death, *pur faire fitz chivaler ou file marrier*. 1 Rol. 596. l. 50.

[*]So, debt lies by him, who is privy in estate: as, upon a lease for years by B. debt lies by his heir for rent due after the death of his ancestor. 1 Rol. 591. l. 47. 5 H. 7. 19. a.

So, debt lies by an assignee of a reversion for rent incurred after attornment. Co. L. 310. 1 Rol. 591. l. 45. And this, by the common law, without the aid of the st. 32 H. 8. 34. 4 Mod. 81.

So, by an assignee of part of the reversion for his proportion. Adm. Cro. El. 637. 651.

So, by a grantee of rent, if the lessee attorns. Semb. 1 Lev. 22.

So, by the devisee of a reversion; for the rent is incident to the reversion. R. 5 H. 7. 19. a. Skin. 367.

So, if a devise be of a reversion of lands *in capite*, which is void for a third part by the st. 32 & 34 H. 8. it lies by the devisee for two third parts of the rent. R. Cro. El. 851. Vide ante, (B).

So, if a devise be of a moiety of a rent, without the reversion, to three sons to be divided; debt lies by each son for his share of the rent. Per 3 J. Poph. cont. Cro. El. 637. 651. Vide Suspension.

So, by a devisee of a reversion against an assignee of a term, after assignment of the reversion, for arrears due before assignment. R. Skin. 367.

So, if lessee for years assigns all his term to B. rendering rent; debt lies by the lessee for the rent, as such, for it is not a sum in gross; though no reversion remains in the lessee. R. Carth. 161. Vide post, (E).

So, against the assignee of B. Carth. 162.

So, if A. the lessee, surrenders, rendering rent, he shall have debt, for the rent, as such, for it is not a sum in gross. Carth. 162. in marg.

So, debt for rent, reserved upon a demise, lies by the lord, who has the reversion by escheat. Adm. 5 H. 7. 19. a. 3 Co. 22. b.

So, if a reversion be granted in mortmain, debt lies for the rent by the lord, who entered for the alienation in mortmain. 5 H. 7. 19. a.

So, by the lord, who claims the reversion by the purchase of his villein. Ibid.

So, debt lies by the assignee of a reversion, after the term expired, for rent due at the end of the term. R. 2 Cro. 117.

So, by an executor of an administrator, who being possessed of a term for 100 years, made a lease for five years, for rent due before the death of the administrator: though the interest in the residue of the term belongs to the administrator *de bonis non*, &c. R. 2 Lev. 100.

(D) BY WHOM NOT.

But if a lessee assigns his term, debt does not lie by the lessor, against the executor of the lessee, for rent due after the assignment. R. 3 Co. 24.

a. Cro. El. 556. Poph. 121. but R. cont. 1 Sid. 266. 2 Vent. 209. Vide post, (E).

So, if the lessor grants his reversion to another, he shall not have debt for rent due after his grant; for the rent is incident to the reversion. 3 Co. 22. b. 23. a. b.

So, a grantee of a reversion shall not have debt against the lessee for rent due after assignment to the term of another. R. Poph. 55.

[*]So, if the grantee of a rent, when the rent is in arrear, assigns his rent and dies; his executor shall not have debt for the arrears by the st. 32 H. 8. 37. for by the assignment, his testator himself had lost his arrears. 4 Co. 50. b.

(E) AGAINST WHOM DEBT LIES.

So, debt is maintainable against the party to a contract, his executor, or administrator. Dy. 4. b. Against whom covenant lies, vide covenant, (C 1, &c.)

As, if a lessee assigns his term, the lessor himself may have debt for rent due after the assignment, if he will; for the privity of contract continues, and the lessor need not relinquish the lessee, and resort to the assignee *no- lens volens*, when perhaps the assignee is not responsible. R. 3 Co. 23.

So, if the executor or administrator of the lessee assigns the term, debt lies against him for rent due after the assignment. R. cont. 3 Co. 24. a. Cro. El. 555. Poph. 120. Semb. cont. Cro. El. 715. Mo. 600. Dub. Latch. 260. R. acc. 1 Sid. 266. R. acc. 2 Vent. 209. 4 Mod. 326. 1 Lev. 127.

So, if the lessee himself assigns, debt lies against his executor or administrator, if he has assets. Cont. 3 Co. 24. a. Dub. Latch. 260. R. acc. 1 Sid. 266. 2 Vent. 209.

So, if the lessee assigns part of the land, a grantee of the reversion shall have debt against the lessee for the whole rent; for the privity continues, where he has assigned only part of the land demised. R. 3 Co. 24. a. Cro. El. 633.

So, if the executor of a lessee assigns part of the land, the lessor may have an action against the executor for the whole rent due after the assignment. R. Lit. 53.

If the lessee assigns part of the land to A. who enfeoffs B., yet debt lies against the lessee. Semb. Dy. 4. b.

So, if the lessee himself makes a feoffment. R. Dy. 4. b. in marg.

So, if the lessee gives an obligation with condition for payment of the rent, debt lies by the lessor, upon the obligation, after assignment of the term, and acceptance of rent from the assignee. Cro. Car. 188.

So, debt lies against the executor or administrator of the assignee, though the executor waives the possession; for if he be executor, he cannot waive in part. R. 2 Rol. 132.

So, if the lessee assigns his term, the lessor, if he will, shall maintain debt against the assignee. Q. Dy. 247, 8.

So, if the lessee assigns a moiety of the land for the whole term; the lessor, if he will, may maintain debt against the assignee for a moiety of the rent. R. 2 Lev. 231.

Or, a joint action against the lessee and assignee. D. 2 Cro. 411.

So, if the lessee assigns his term, rendering rent to him; though the whole of the term be assigned, debt lies by the assignor upon the contract, against

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the assignee, his executor or administrator. *Adm. 2 Mod. 175. Vide ante, (C).*

Vide Chancery, (2 Z).

[*](F) AGAINST WHOM NOT.

But if a lessee assigns his term, and the lessor accepts rent from the assignee: debt does not lie afterwards against the lessee, his executor, or administrator, for he may plead in bar such assignment and acceptance of rent by the lessor. *R. 3 Co. 24. b. Cro. El. 715. Mo. 600. R. 2 Cro. 334. 2 Bul. 151.*

So, if an executor or administrator of a term assigns it, and the lessor accepts the rent from the assignee. *3 Co. 24. Cro. El. 715. Mo. 600.*

So, though it does not appear that the lessor had notice of the assignment, at the time of the acceptance of the rent; for it shall be intended till it appears to the contrary. *R. 2 Cro. 334.*

So, if the lessor accepts any part of the rent. *Semb. 1 Lev. 308.*

So, if a lease be of tithes, rendering rent, and the lessee assigns, and the lessor accepts rent from the assignee; though rent does not issue out of tithes. *Dub. 1 Lev. 308.*

So, if the assignee of a term assigns over to another, debt does not lie against the first assignee, for rent due after his assignment, though no notice of the assignment or acceptance of rent be alleged; for the privity is gone by his assignment. *R. per two J. cont. but Powell acc. in C. B. but this judgment was reversed in B. R. 3 Lev. 295. 2 Vent. 234. 1 Sal. 81. Carth. 177. 4 Mod. 71. R. cont. per two J. Twisd. acc. 1 Sid. 338, 9. Ray. 162.*

[If the assignee of a term assigns it over to a beggar, a prisoner, it is not fraud, and he is discharged of the rent. *H. 18 G. 2. Str. 1221.*]

So, if a lessee assigns his whole term to the lessor, rendering rent; debt does not lie against the executor of the lessor, for the assignment amounts to a surrender, and therefore no remedy after the death of the lessor; but in equity. *R. 2 Mod. 175.*

(G) DEBT TO THE KING.

(G 1.) By what means accrued.

If a man gives an obligation, recognizance, &c. to the king, he becomes indebted to the king.

[A bond taken in the name of the crown, by the cashier of the excise, from a man as security for the banker with whom he intrusts the crown's money, is good. *H. 1719, Bunb. 58.*]

So, every person, who by any means is chargeable to the king, shall be debtor to the king; for it shall be taken extensive: as, where he is answerable to the king for debt, damage, duty, rent arrear, &c. *Godb. 295.*

[Land-tax money in the hands of the collector is a debt to the king. *T. 7 G. 2. Str. 978.*]

So, if a man gives an obligation to the king, for performance of covenants; when those are broken, he is a debtor to the king. *R. 7 Co. 20. b. Sir Tho. Cecil.*

Or, gives an obligation to another, which is assigned to the king, *Vide Assignment, (D).*

So, if a man indebted upon a judgment in debt, trespass, &c. acknowledges a recognizance to the king, without cause, upon covin to [*]avoid the imprisonment at the suit of his creditors, and to be turned over to the Fleet; though by the st. 1 R. 2. 12. he shall be remanded to his first prison, till he has made gree with his creditors; yet after such gree, he shall return to the Fleet, and there abide till he has satisfied his recognizance confessed. 4 Inst. 111.

So, before the st. 33 H. 8. 39. an obligation to another, to the use of the king, made the obligor debtor to the king.

But now, by that act, all obligations or specialties made to the use of the king or his heirs, or for any cause touching the king or his heirs, shall be made to the king *hæredibus vel executoribus suis*, and to no other to his use: and if any take or make obligation, &c. otherwise, he shall suffer imprisonment at the discretion of the king or his council: and if not contented in the king's lifetime, they shall remain and be to the heirs or executors of the king at his free disposition, assignment, or appointment.

And by the st. 7 Jac. 15. no debt shall be assigned to the king, which was not originally due to his debtor, or accountant. Vide post, (G 15.)

By the course of the exchequer, confirmed by the st. 8 & 9 W. 3. 28. a teller of receipt in the exchequer, into whose office any money by way of loan, advance, or for tax, &c. shall be paid, shall without delay weigh, and enter the weight and tale according to the antient course, and throw down a bill or bills for the same, in parchment signed by himself, into the tally-court, as soon as the officers be there, whereby a tally may be levied, &c. and the teller plainly charged.

So, estreats (*extracta*) are made out of chancery, B. R. C. B. *iters*, &c. of fines, amerciaments, &c. in those courts; upon which summonses of the exchequer issue for levying those debts. Mad. 707, 8.

So, if a man takes the king's goods, he is accountable for them to the king. 11 Co. 90. Vide Accompt, (A 1.)

So, if he takes broken ordnance, &c. by colour of his office, as fees, claiming them to his own use; he shall be accountable to the king. 11 Co. 90. 2 Rol. 161. l. 15.

So, if he takes by colour of a warrant, for his fees or expences, when the warrant is not lawful. R. 11 Co. 92. 2 Rol. 161. l. 20. Cro. El. 545.

Or, the king may charge him, who made the illegal warrant, at his election. 11 Co. 92. b. 2 Rol. 161. l. 25.

So, if an officer has an obligation to the king, and delivers it to his servant, to be transmitted to him who has the custody of the obligations, and the servant cancels, or embezzles it, his master is liable. Godb. 296. Dy. 161. 2 Rol. 156. l. 15.

So, if he pays money out of the exchequer, without a grant or authority under the great seal, or privy seal, or by virtue of an act of parliament. By the st. 8 & 9 W. 3. 28. s. 6.

So, if a man enters by wrong, and takes the profits of the king's land, he shall be accountable for the profits. 2 Rol. 161. l. 12. Vide Accompt, (A 1.)

Or, takes goods devised to the king before they come to his hands; for the law does not put him to his action of trespass. 2 Rol. 161. l. 17.

So, if several be joint accountants to the king; each shall answer for the whole to the king; and not only for so much as he has received. Hard. 314.

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[*]But if a man receives the king's money, not knowing it to be so, he shall not be chargeable; as, if an officer purchases land, and pays the king's money in his hands for it; the vendor, if he be not conusant of it, shall not be charged for it. R. Cro. El. 545.

So, an obligation to the king, if it be not to him, his executors or successors, is not within the st. 33 H. 8. 39. Mo. 193.

(G 2.) By what means satisfied.—By the body of the debtor.

By the st. 33 H. 8. 39. obligations, &c. concerning the king, shall be of the same force and effect as a statute staple.—So, by the st. 13 El. 4. debts due by any accountant, &c. Vide Execution, (B 3.)

By common law, the body, goods, and lands of a debtor, or accountant to the king, were liable for the debt. 3 Co. 12 b. 2 Inst. 19. Godb. 290. 2 Rol. 295.

(G 3.) By his goods.

All the goods and chattels of the debtor are liable to satisfy the king's debt.

And if his debtor dies, the king may command the goods of the deceased to be seized till satisfaction. 2 Rol. 158. l. 41. Vide the st. 9 H. 3. 18. Mad. 663. 665.

And he may take security of the executor for payment, before he be allowed to administer. 2 Rol. 158. l. 45.

So, he may seize *bona ecclesiastica*, if the debtor be a clerk. 2 Rol. 158. l. 40.

If the king's debtor becomes *felo de se*, the debt shall be paid before the goods be disposed of by the almoner. Sav. 60.

But things necessary *pro victu* of him and his family shall not be seized. 2 Rol. 160. l. 5.

Nor, *averia caruæ*, if there be other chattels sufficient. 2 Rol. 160. l. 5. And this, by the st. Art. sup. Chart. 12. 2 Inst. 132. 565.

Nor, the horses, or arms of a knight. 2 Rol. 160. l. 5.

(G 4.) Or lands.

So, all the lands and tenements of the debtor are liable to be extended for the king's debt, which he has, or of which he is seised. Godb. 294, 5. which he has at the time of the assignment, where the debt is assigned to the king. Hard. 24. Pl. Com. 321.

Though the king afterwards releases all his right to the terre-tenant: for he is chargeable in respect of his person. 2 Rol. 160. l. 40.

So, a reversion, when it comes into possession. Sav. 34, 5.

So, all the lands of a conusor, &c. are chargeable upon a debt assigned to the king; though only a moiety was before. Sav. 133.

So, lands purchased by covin with the king's money. 2 Rol. 160. l. 20.

And by the st. 13 El. 4. if any accountant, who shall receive, or be chargeable with any money of the queen, shall be found in arrear, and do not pay in six months, the queen by letters patent may make sale of so much of his lands as will satisfy the debt. And this act is intended by the st. 14 El. 7. to under-collectors, &c. and by the st. 1 Jac. 25. made perpetual.

And by the st. 27 El. 3. the sale may be after the death of an accountant for the receipt of the money, and if the account be settled within eight years after his death, as well as if it was in his lifetime, if the accountant

[*]had not a *quietus* in his lifetime: provided no sale be made during the nonage of the heir.

So, lands in trust for him, or of which he has a power of revocation, though settled *bona fide*. R. Godb. 290. Hard. 24. 3 Rol. 295, &c.

Though the settlement, with power of revocation, was made before he become accountant to the king. R. Godb. 290.

(G 5.) In the hands of the heir.

So, the king may seize the lands of his debtor upon his death.

And may resort to the heir, though the executor has assets. Cont. Dy. 67. b. in marg.

And by the st. 33 H. 8. 39. all lands, &c. which come by descent to the heir, in fee, or in general or special tail, or by gift of his ancestor, shall be chargeable for a debt to the king, by a judgment, recognizance, obligation, or specialty of his ancestor.

And though the word heirs be not comprized in such specialty.—Otherwise, where an obligation is assigned to the king. R. Sav. 2.

And therefore, though lands of the issue in tail were not chargeable before, they are now chargeable, as well as lands which descend in fee, for the debt of his ancestor by judgment, recognizance, obligation, or other specialty. R. 7 Co. 21.

So, lands of the heir, by the gift of his ancestor, before or after the ancestor was bound to the king, shall be charged. 7 Co. 19. a.

But lands are not chargeable in the hands of the issue in tail, for a forfeiture or other debt to the king, except by judgment, recognizance, obligation, or specialty. R. 7 Co. 21. b.

Nor, for a debt to the king by judgment, &c. if the issue aliens *bona fide* before extent or process against him. Ibid.

Nor, for a debt to the king by judgment, recognizance, &c. if it was originally made to a subject, and afterwards came to the king by attainder, forfeiture, assignment, &c. R. 7 Co. 22. a.

So, by the st. 33 H. 8. 39. the king may, at his liberty, recover his debt against the executor or administrator, if he has assets.

And by st. M. Ch. 9 H. 3. 8. and by the process since the st. 33 H. 8. 39. if it appears to the sheriff that the goods of the debtor are sufficient for the king's debt, the sheriff ought not to extend the lands. 2 Inst. 14. Mad. 667.

[Wherever an extent might have issued in a man's life, a *diem clausit extremum* may issue against his estate after his death. M. 1722, Bunb. 118.]

[*Diem clausit extremum* may issue against the estate of simple contract debtor on commission, though he was not the king's debtor by record at his death. P. 23 G. 2. Parker, 95.]

(G 6.) In the hands of a stranger.

So, if the debtor dies without heir or executor, process shall go against the terre-tenants. 2 Rol. 162. l. 15. Vide post, (G 10.)

So, if the debtor aliens his land, and then dies without heir, execution shall be against the terre-tenants. 2 Rol. 156. l. 50. Godb. 292.

So, if he aliens his goods, and dies without executor, process shall be against the possessors of the goods. 2 Rol. 156. l. ult.

If a lord of a manor forfeits his issues for not serving upon a jury, they may be levied upon the lands of the copyholders, lessees for life or [*]years; for it is an inherent charge upon the land. 2 Rol. 157. l. 45. Vide post, (G 10.)

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So, if a debtor to the king aliens his lands after the obligation, &c. made, or after he becomes an officer in which respect he is accountable; they are chargeable, for it relates to the time of the debt, office, &c. Vide post, (G 9.)

[But goods pawned or pledged before the *teste* of an extent are not liable. T. 24 & 25. G. 2. Parker, 112.]

So, by the st. 13 El. 4. if any accountant, or indebted, &c. purchases lands in the name of any other, for his own use or profit, the same shall be liable to such debt, &c. in the same manner as if the debtor himself was seized, &c.

So, if the debtor takes a term for years to him and his wife, it shall be taken in execution in the hands of the wife after the death of the husband. 8 Co. 171.

So, a purchaser of lands, &c. after a judgment, obligation or specialty to the king, shall be charged for the king's debt. Sav. 60.

So, a purchaser after assignment where a debt is assigned to the king.

But if, after a recognizance to the king, the conusor be attainted for treason, a *scire facias* does not lie upon the recognizance against the king's patentee. Sav. 60.

By the course of the exchequer, process does not go against a purchaser, if the executor, or heir, has assets. Dy. 67. b. in marg.

And by the st. 33 H. 8. 49. lands, &c. in the seisin or possession of divers, other than the obligor, shall be entirely chargeable, and not severally.

[Postmaster appointed for three years, gives bond for three years; at the three years end he is indebted 9*l.*, afterwards he mortgages an estate, and the mortgagee has possession on ejectment; he is continued postmaster without new appointment or bond, and becomes indebted 72*l.* His bond shall extend to that, and the estate mortgaged be liable to an extent. M. 1729, Bunb. 275.]

(G 7.) By the goods of a stranger.

So, upon an execution for the king's debt, the goods of a stranger *levant* and *couchant* upon the land of the debtor, may be taken. 2 Rol. 159. l. 30.

So, the cattle of a stranger which the debtor suffers to manure his land. 2 Rol. 159. l. 42.

So, for rent due to the king, the goods of a stranger may be distrained. Godb. 295.

So, a debt due to the king's debtor shall be extended for the king's debt. 21 H. 7. 12. 16. Godb. 291.

Though due upon simple contract. Godb. 296.

[If on an extent against A. the king's debtor, the inquisition finds that B. is indebted to him; on return of inquisition, and affidavit that the money in B.'s hands is in danger, an immediate extent shall issue against B. (T. 1718, Bunb. 24.), even though there is reason to suppose that A. became so with intent to strip the rest of B.'s creditors. P. 1723, Bunb. 127.]

[Upon an extent in aid, debts without specialty cannot be found without motion. P. 1719, Bunb. 42.]

[*][Simple contract debt may be found and seized to the third degree, but not beyond it. M. 30. C. 2. Parker, 259.]

[If it be found by inquisition against a receiver-general, that he has paid over money to A., an immediate extent may issue against A. P. 1723, Bunb. 127.]

[So, in the case of an under-treasurer of the ordnance. M. 1723, Bunb. 134. H. 1725.]

[An extent in aid being prerogative, process is always under the care of the court of exchequer, and they have a discretionary power over their own rules. Per cur. Ibid.]

[Where many small debts are found on an inquisition, on an extent against the king's debtor, instead of separate extents against each separate debtor, the court may order a receiver to collect them, and pay to the deputy remembrancer. M. 1730, Bunb. 293.]

[Debts to the king's debtor are not bound till the *teste* of the inquisition. T. 1725, Bunb. 199.]

[Debts to the king's debtor are not bound by the *teste* of the extent, but only from the caption of the inquisition. P. 1729, Bunb. 265.]

But the goods of a stranger taken for the king's debt, cannot be sold as the goods of the debtor himself may. Semb. 2 Rol. 159. l. 35. R. Cro. El. 431.

So, if land be extended upon a recognizance to A. at 20*l.* *per ann.* which was of the real value of 60*l.* *per ann.*, and the conusor is bound by recognizance to B. who is outlawed: the king shall not take the surplus above 20*l.* *per ann.* though it be found by inquisition that the land was of such value. R. per two J. Clark cont. Cro. El. 266.

So, if a joint-tenant, or tenant in common, be a debtor to the king; the goods of his companion cannot be taken, though they be *levant* and *couchant* upon the whole land. 2 Rol. 159. l. 40. Vide post, (G 10. 15.)

[On importation and entry by one partner only, if by mistake the whole duties are not paid, each of the partners is liable in the whole deficiency to the crown; though ten years afterwards, and five years after the importer was bankrupt. H. 1721, Bunb. 97. M. 1726, Bunb. 223. H. 1732, Ibid.]

[So, in debt for non-payment of duties. M. 1726, Bunb. 223.]

Nor, the goods of a testator or intestate, if the debtor takes the executrix or administratrix to wife. 2 Rol. 159. l. 50.

Or, if the debtor be made executor to another. Godb. 296.

[So, a woman shall not be distrained for the king's debt, in her dower, if the heir has sufficient. Mad. 667.]

[A debt due to a man *jure uxoris*, is considered as a debt originally due to him, within the meaning of 7 J. 1. c. 15. R. H. 7 Ann, Parker, 271.]

By the st. 33 H. 8. 39. in all suits on specialty to the king, he shall recover his costs and damages. Vide Damages, (A 3.)

[If an officer of the revenue appoints another to act under him, who being in arrear applies to the principal for money, who pays the whole debt to the crown, and takes a bond for it from the deputy to himself, he shall not have an extent in aid; though generally a debtor of the crown shall have crown process to reimburse himself, though the crown debt is paid. M. 1726, Bunb. 221.]

[*][Extent in aid shall not issue, but for a debt originally due to the crown's debtor; so if A. is indebted to B. who assigns to C. before the extent issues against C. an extent obtained against A. shall be discharged. M. 1726, Bunb. 225.]

[If an extent finds a debt due from a merchant, and it does not appear that this was the crown's money; an extent in aid shall not go. N. B. The affidavit did not go far enough, and was not in the old form. P. 1731. Bunb. 300.]

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[No *diem clausit extremum* can issue against one who was not debtor to the king, or found in his lifetime, to be debtor to the king's debtor. P. 16 G. 2. Parker, 16.]

(G 8.) The king shall be preferred.

The king by his prerogative shall be preferred before any other creditor in an execution for his debt. 2 Inst. 32. By M. Ch. 9 H. 3. 18. and the st. 33 H. 8. 39. Godb. 290. Hard. 24. Mad. 662.

And therefore if the king's debtor be sued in C. B. it may be superseded by a writ of privilege, reciting that the king ought to be paid before other creditors. 2 Rol. 159. l. 10.

So, if A. be taken upon a *capias*, at the suit of B., and afterwards (before the return of the *capias*) a writ issues for the king's debt, with a *teste* before the taking of A., he shall be in execution at the suit of the king, as well as for B. 2 Rol. 158. l. 25.

So, if the goods of A. and his lands are seized by extent upon a statute-staple, at the suit of B., and after the day of the return, but before an actual return, and before a *liberate*, a writ issues to the sheriff for the king's debt, it shall be preferred. 2 Rol. 158. l. 15. R. Dy. 67. b.

[If goods are levied by virtue of a *fiери facias*, three days before the *teste* of the extent, yet that shall be no bar to the crown: and if the sheriff makes that return on the extent, the court will order him to amend it. T. 1716, in Sc. Bunb. 8. (Sed Q. if the goods were sold.)]

[If a commission of bankrupt issues, and assignment is made, and the assignees seize part of the goods on the 31st, and an extent for a debt to the crown on bonds, some forfeited, some not, issues, tested the same day; the extent shall have the preference, and the court will not on motion order an account of what was due at the time. H. 1718. Bunb. 33.]

[If a bankrupt, against whom there is an extent for a debt to the crown, has promised that he will also pay a debt of his father deceased to the crown; the assignees shall pay both debts, to have the extent discharged. P. 1734, Bunb. 337.]

[Extent against the king's debtor, tested after a distress taken for rent, with notice to the tenant, and appraisement made, but before sale, shall prevail against the distress. T. 24 & 25 G. 2. Parker, 112. 2 Vesey, 288.]

[But not if the goods distrained had been sold before the *teste*. Ibid.]

[If corn is distrained for rent, and extent issues after, but tested before, it shall be preferred, for it binds from the *teste*. P. 1719, Bunb. 39.]

[If after extent, inquisition, and seizure of goods, and defendant's bankruptcy, other goods are discovered, the court will quash the extent, &c. and grant new extent of the same. *Teste* with the former. T. 27 & 28 G. 2. Parker, 176.]

[Or, if a second extent had issued after assignment under the bankruptcy, [*]the court would quash it and grant new extent of same *teste*. H. 17 G. 2. Parker, 35.]

So, by the common law, the king's debtor had protection, that he should not be sued by other creditors until the king's debt was paid: but now, by the st. 25 Ed. 3. 19. other creditors may sue to judgment, but execution shall stay till gree for the king's debt; and then they shall have execution for what is paid to the king, and their own debt. Godb. 290.

But by the st. 33 H. 8. 39. suit or process for the king's debt shall be

preferred before other persons, so always as that the king's suit be commenced, or process awarded, before judgment for the said other persons.

And therefore, if execution be upon a judgment against the king's debtor, and before a *venditioni exponas*, an extent comes at the king's suit, those goods cannot be taken upon the extent. R. 3 Mod. 236. R. Hard. 27.

[A judgment recovered by a subject, though not completely executed shall be preferred to the king's extent, sued out posterior to the judgment. C. P. H. 19 Geo. 3. 2 Bl. 1251. 1294.]

[If goods be taken in execution on a *fiery facias* against the king's debtor, and before they are sold an extent comes at the king's suit, grounded on a bond debt, tested after the delivery of the *fiery facias*, these goods cannot be taken upon the extent. B. R. M. 32 Geo. 3. 4 T. R. 402.]

[But overruled in a subsequent case.—Process sued out by the crown to recover penalties, on which judgment for the crown is afterwards obtained, entitles the king's execution to have priority within the statute before the execution of a subject, which had issued on a judgment recovered prior to the king's judgment, but subsequent to the commencement of the king's process; the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. 1 East, 338.]

[Precedent judgment on bond shall be preferred to the king's; subsequent, not. P. 4 W. & M. Parker, 262.]

[If executor pleads precedent judgment and subsequent judgment in one entire plea, judgment is against him. Ibid.]

So, the king shall not be preferred, where a debt is assigned to him after the death of the debtor. R. 2 Rol. 159. l. 15. 1 Brow. 37.

So, though a man be in execution for the king's debt, he may be charged also in execution at the suit of a common person. 2 Rol. 158. l. 30. Cro. Car. 890.

And if he be first in execution for the king's debt, though he may be charged also in execution by a common person, it does not take effect till the king's debt be satisfied. Godb. 298.

[On a distress for rent made six days before the *teste* of an extent, the court refused an attachment, though the goods were not sold. P. 1719, Bunb. 42.]

[Simple contract debt seized into the king's hands, is to be preferred to bonds not paid before seizure; but payment of bonds by administrator before seizure or notice may be pleaded. M. 3 & 4 Jac. 2. Parker, 260.]

[Immediate extent finding the same goods shall be preferred and paid before former extents in aid. Immediate extents take place according to the *teste*. T. 12 Ann. Parker, 281.]

[*][And this even if the goods are sold, and return that the sheriff has the money, but not if delivered. M. 4 G. 1. Parker, 282. Vide Execution, (B 4.)]

(G 9.) How execution for the king relates.

[An extent cannot be antedated. P. 1724; T. 1726; Bunb. 164. Str. 749.]

If an execution be sued upon land, for the king's debt, upon an obligation, &c. this being in nature of a statute-staple, the execution upon it relates to the time of the obligation, &c. given, and all the lands which the party had at that time shall be chargeable. 2 Rol. 156. l. 25.

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Though he had aliened them before the action commenced against him. 2 Rol. 156. l. 25.

So, if a debt be assigned to the king, execution upon it relates to the time of the assignment. Hard. 24. R. Sav. 11.

So, by the st. 13 El. 4. lands, &c. of any accountable, &c. shall be liable to payment of a debt to the queen, as if he had the day he first became an officer stood bound by a statute-staple, &c.

And therefore, if an officer purchases land, and afterwards aliens, or demises *bona fide* for valuable consideration; it shall be liable to the king's debt, though the money, &c. for which he is accountable was received several years after the alienation; for the statute has relation to the time when he first becomes officer. R. 10 Co. 55. b.

And by the st. 13 El. 4. lands, &c. which any treasurer or receiver in the court of exchequer, wards, and liveries, or duchy of Lancaster, treasurer of the chamber, cofferer of the household, treasurer of war, or any fort, &c., of the admiralty or navy, treasurer, or other person accountable for any office or charge in the mint, treasurer or receiver of monies imprest for the use of the queen, &c. customer, farmer, or collector of customs or other duties in any port, &c. collector of tenths or any subsidy, receiver general of any county, shall have whilst he remains accountable, &c. shall be liable.

So, by common law, if the king obtains judgment for a debt of his farmer, &c. his land, which he had the day of the writ purchased, shall be liable. 2 Rol. 157. l. 2. Vide Execution, (D 1, 2.)

If a plaintiff be amerced *pro falso clamore*, it relates to the day of pledges found.

But execution for the king, as to chattels real or personal, relates only to the award of execution. 2 Rol. 157. l. 5—25.

And therefore, if the debtor aliens a term for years, or other goods, *bona fide*, after the action commenced, or judgment given, before execution awarded, the sale shall be good. 8 Co. 171.

(G 10.) Who are not liable for the king's debt.

But if tenant by the curtesy be debtor to the king; his issue shall not be chargeable, though he has the lands by descent as heir to his mother. 2 Rol. 157. l. 37.

Though the debtor has no other land. 2 Rol. 157. l. 40.

If the king grants a manor in fee-farm, the lands or goods of the copyholders are not liable for the rent; for they are elder, being by prescription. R. 2 Rol. 157. l. 50.

So, if the king has a rent by prescription, where there is no usage to levy it upon them. 2 Rol. 157. l. ult.

[*]So, if a joint-tenant be indebted to the king, the moiety of his companion shall not be charged. 2 Rol. 157. l. 37.

Nor, his cattle, though they go upon the whole land. 2 Rol. 159. l. 40.

So, if a man purchases land to him and his wife, and to the heirs of the husband, for the jointure of the wife, having taken an office, and afterwards becomes indebted to the king, and dies; the estate is not liable during the life of the wife. 2 Rol. 156. l. 30. Dy. 225. a.

So, if a settlement be made in the same manner for the jointure of a wife, by the husband who afterwards had an office. 2 Rol. 156. l. 35.

So, if A. takes an office, &c. and afterwards makes a settlement upon a son or daughter in marriage, and becomes indebted to the king, and after-

wards takes another office, in which he is indebted; the son, &c. though subject to the arrears of the first office, shall not be subject to the money due in the second office. R. Mo. 127.

So, if the king's debtor conveys to A. who conveys to the king, who re-grants to A. rendering rent, these lands are not now chargeable; for though the land is chargeable only in respect of the person of the debtor, yet when it comes to the king, it cannot be charged, nor in the hands of the grantee of the king against his own grant. 2 Rol. 160. l. 30.

[Legacies charged on land sold, with notice, to the king's debtor, shall be paid. H. 7 Ann. Parker, 272.]

(G 11.) Suit for the king's debt.—In what court it shall be.

By the st. 33 H. 8. 39. all suits for debts or duties to the king, in the offices or courts of the exchequer, duchy of Lancaster, augmentation, surveyor-general, master of the wards, or court of first fruits and tenths, shall be sued in such of the said courts or offices in which they first grew due, or in which the recognizance, obligation, or specialty shall remain.

And the said courts shall have full authority to hear and determine the said suits, and do execution on the body, lands and goods, of the party.

(G 12.) How he shall sue.

The king may charge him who enters into his lands, as bailiff or intruder. Mo. 476. Vide Action, (B 1.)—Prerogative, (D 85, 86.)

So, he may charge him, who takes his treasure without warrant, as a trespasser, or in accompt, at his election. Mo. 476.

If the king sues a personal action, he may lay it in what county he pleases, by his prerogative. 1 Sid. 412. 1 Vent. 17. Vide Prerogative, (D 85.)

So, a *scire facias* lies against an heir, upon a suggestion of the death of his ancestor, without finding his death by office. R. Sav. 3.

[A *diem clausit extremum* may issue for a simple contract debt to the king. T. 1750, in Sc. 1 Vesey, 483.]

(G 13.) When the suit shall be barred.

By the st. 33 H. 8. 39. if any person against whom suit is for debt or duty to the king, can shew and prove matter in law, &c. in bar or discharge of such debt or duty, the court shall acquit, &c. And this by the st. 5 R. 2. 9. without letter, or command of the king.

[*]And therefore, to every suit or process for the king's debt, at common law, or by that act, the defendant may allege in bar, any matter for his discharge. 7 Co. 19. b. R. Hard. 502.

As to a *scire facias* upon an obligation to the king, against the heir and terre-tenants, they may plead, by plea in Latin, equitable matter for their discharge: as, that the obligation was given upon a contract for trees growing upon the land of a person attainted, which attainder was afterwards reversed by act of parliament, and the trees were never felled. R. 7 Co. 20.

And to a bill in equity, any matter may be alleged or pleaded, which will be a discharge in law, or equity. Hard. 502.

If the defendant alleges matter in equity for his discharge, and the attorney-general demurs, it will be sufficient proof of the allegation. Dub. Lane, 51.

The defendant shall be allowed to defend, by attorney, by the st. 5 R. 2: 9. 4 Inst. 110.

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And no accountant shall be charged before he is summoned. 4 Inst. 110. [If an accountant obtains his *quietus*, it is pleadable to every thing prior to it: though he continues an accountant, and becomes indebted to the crown afterwards. P. 1732, Bunb. 315.]

And he shall be allowed debts due by the king to himself. 4 Inst. 110. After plea, goods seized shall be delivered to the defendant upon sureties, Sav. 3.

But in an information for goods, which came to the hands of B., and which he converted to his use, not guilty is no plea; for it denies the conversion only, and does not answer to the account, which ought to be specially answered. R. 2 Leo. 34.

[On bond to export and not re-land, defendant pleaded the statute of equity, and that the goods were taken away by force; but not allowed. H. 1718, Bunb. 37.]

(G 14.) How the trial shall be.

By the st. 33 H. 8. 39. all trials in suits, bills, informations, &c. of issues in the court of exchequer, shall be made by examination of witnesses, writings, proofs, and such other means as the court shall think expedient. Vide 4 Inst. 110.

Where issue is joined upon a suit in the office of pleas, the trial shall be by a jury.

And the trial by jury may be at bar, or by *nisi prius*.

By the st. 5 R. 2. 16. nothing but two shillings shall be paid for the record and writ of *nisi prius*.

After issue upon English bill, the trial shall be by examination of witnesses in court, or by commission, and other proofs. Vide chancery.

After issue joined in an information of intrusion, to be tried by the country, the king may demand that the trial be by record. 4 Inst. 109.

(G 15.) How the proceedings shall be for a debt assigned to the king.

So, if a debt be assigned to the king, he shall have execution against the body, lands, and goods of the debtor. 4 Inst. 115.

If a debt upon obligation be assigned, and the obligor dies, and his [*]executor is sued; he shall not plead a judgment to another, and no assets *præter*. Hard. 25.

So, if an obligation be assigned to the king, the execution shall take all the lands of the debtor; though the obligee himself could have had but a moiety. Hard. 24. Sav. 133.

So, if a man recovers 500*l.* in an action on the case against B., and is afterwards outlawed, the king shall take all the land of B. in execution, though the plaintiff could have had but a moiety. R. 2 Cro. 513.

So, if A. be indebted to the king, and B. indebted to A., the king shall have process against B. for the debt due by him to A. 8 H. 5. 4. a. 4 Inst. 111. Mad. 666. 668.

So, if C. be indebted to B., and D. be indebted to C., the king shall have process against C. or D., and so against the debtor of his debtor *in infinitum*.

So, before a privy seal made 12 Jac. and after the death of king James, until a rule made 15 Car. 1. the king's debtor might, by English bill in the

exchequer, have an extent against the debtor of his debtor. Lane, 112. Hard. 403, 4.

So, if a surety, or a stranger, being distrained for the king's debt, gives an obligation for payment; process shall go against the principal debtor, and if it be recovered, the obligation shall be re-delivered to the surety. R. Lane, 91.

But if a joint-tenant of goods be indebted to the king, he cannot assign all the goods to the king, but his part only. Cro. El. 265. Vide ante, (G 7, 10.)

So, an obligation, recognizance, &c. for performance of covenants, to indemnify, or for other cause, except for a debt, cannot be assigned to the king. 4 Inst. 115. Cont. Ow. 46. 2 Leo. 55.

So, by the st. 7 Jac. 15. no debt shall be assigned to the king, which was not originally due to his debtor or accountant.

So, a moiety, or part of a debt, cannot be assigned to the king. Ow. 2. 46.

So, if an extent in aid be procured by the king's debtor, who has sufficient to answer to the king, he shall refund with costs upon a bill in equity. 1 Ver. 469.

PLEADING IN DEBT. Vide PLEADER, (2 W 1, &c.)

DEBET ET DETINET. Vide PLEADER, (2 W 8.)

NIL DEBET. Vide PLEADER, (2 V 6.—2 W 13. 17. 43. 47.)

PAYMENT OF DEBTS. Vide ADMINISTRATION, (C 1, 2.)—CHANCERY, (3 A 4, &c.—4 W 14.)

DEVASTAVIT.

Vide ADMINISTRATION, (I 1, &c.)

DEVISE,

Removed to ESTATE, which see.

[*]DIGNITY.

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(A) DIGNITY.

The king is the fountain of all dignity and honour in the kingdom. Vide in Prerogative, (D 31.) As to the dignity of the king, vide Roy, (D)

And therefore, the king may create a new dignity, which was not before. R. 12 Co. 81.

But he cannot create another king in any part of his kingdom. 4 Inst. 287.

If a foreign king creates any person noble, he shall not be allowed his dignity by the law here. 7 Co. 16. a.

Though our king by his letters of safe-conduct names him by his title of duke, earl, &c. 7 Co. 16. a.

Or, makes him a denizen by the same title; or, if he be naturalized by parliament. Dod. Nobility, 4.

[*](B) TO WHAT PERSONS IT BELONGS.

(B 1.) To the nobility, &c.—As the prince.

Persons of dignity are noble, or under the degree of nobility; or, the superior, and inferior nobility. 2 Inst. 583, 4.

As to the prince, vide Roy, (G).

(B 2.) Duke.

The first duke made in England was Edward the Black Prince, created 11 Ed. 3. 2 Inst. 5. 9 Co. 49. a.

(B 3.) Marquis.

The first marquis was Robert de Vere earl of Oxford, created 8 R. 2. marquis of Dublin in Ireland. 2 Inst. 5.

(B 4.) Earl.

The earl had the custody of the county antiently. Co. L. 168.

And it was the supreme name of dignity before 11 Ed. 3. 4 Co. 49. a. Sal. 509.

He was always created by letters patent. Sal. 509. Skin. 518.

And ought to be earl of some place, within or out of the kingdom. Skin. 519.

But there is no need that there be such a place in England, or elsewhere. Sal. 510. Skin. 519.

(B 5.) Viscount.

The first viscount was John Beaumont, created viscount Beaumont 18 H. 6. 2 Inst. 5. Pal. 565.

And he shall have a seat among the peers in parliament. R. 21 H. 6. Pal. 565.

(B 6.) Baron.

All the nobles are barons of the realm; for a superior degree of nobility does not extinguish the inferior. 2 Inst. 6.

A baron originally was created by tenure, Sal. 509.; and afterwards by writ or patent. Vide post, (C 1, &c.)

(B 7.) Knight.

Persons under the degree of nobility, who are sometimes called the inferior nobility, are knights, esquires, and gentlemen. 2 Inst. 666.

Knights are baronets, knights of the garter, of the bath, bannerets, and bachelors. 2 Inst. 666.

A baronet only has a dignity descendible; who was first created 9 Jac. to him and the heirs male of his body. 2 Inst. 666.

And if he be created a baronet to him and the heirs male of his body, without reference to some place; it will be a fee-simple conditional, and forfeitable for felony. R. 12 Co. 81..

If he be created a baronet of such a place; it will be an estate-tail within the st. W. 2. R. 12 Co. 81.

But the king cannot create a dignity higher than a baronet, and under a baron. R. 12 Co. 81.

If the fees for a knight made are not paid, an action lies for them. 1 Rol. 87.

[*]The fees by an order of king James I. were settled at 20*l.* for knights made by him. 1 Rol. 87.

Who was compellable to be a knight, vide in Homage, (G 4.)

(B 8.) Esquire.

An esquire is he *qui in clypeis gentilicis honoris insignia gerit*; and it is not reputed a dignity. 2 Inst. 667. Vide Spel. Gloss. verbo Armiger.

All nobles of another kingdom, who are not knights, by the common law, are reputed esquires here. 2 Inst. 667.

So, all the sons of a peer of this realm. 2 Inst. 667.

So, the eldest son of a knight. 2 Inst. 667.

So, the eldest son of such eldest son, or of the son of a peer, for ever: Semb. Dod. Nobility, 144.

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So, a man may be an esquire by creation, with a collar of S. S. and spurs of silver, or by patent. Nobility, 144.

So, the first-born son of such an esquire for ever. Dod. Nobility, 144.

So, by being chosen esquire to the body of the prince. Dod. Nobility, 144.

By attendance upon the king's coronation in some employment. Dod. Nobility, 141, 5.

By employment in any superior office of the kingdom. Dod. Nobility, 145.

(B 9.) Gentleman.

A gentleman is he, *qui insignia gentilicia geret*; and differs little from an esquire. 2 Inst. 667, 8. Vide Addition, in Abatement, (F 19, &c. 26.)

And he may be by his birth, by deeds of arms, by a herald, by office, or reputation. Dod. Nobility, 147.

A gentleman by his birth does not lose his title, though he goes to the plough, or be reduced to poverty. Dod. Nobility, 149.

Or, be bound apprentice to a merchant, or other trade. Dod. Nobility, 150.

But a gentleman by his office ceases to be such, if he loses his office. Dub. Nobility, 150.

Vide Abatement, (E 20.—F 19.—H 44.)

(C) HOW ONE MAY BE ENTITLED, OR HOW CREATED.

(C 1.) By prescription.

A man may have a title to nobility by prescription. Co. L. 16. a.

(C 2.) By tenure.

So, he may be a baron by tenure. Sal. 509. Skin. 434. 436.

And such barony goes with the land to the heir male, or otherwise, as the land is limited. Skin. 437.

(C 3.) By writ.

So, he may be created by writ: as, if the king by writ of summons requires any to come to parliament, and upon that he sits in the house of peers: he is a baron to him and his heirs. Co. L. 16. b.

Though there are not words of inheritance in the writ. Co. L. 16. b.

And this was the antient way of creation. Co. L. 16. b.

[*]And upon such creation by writ, if a baron summoned to parliament dies, having issue a daughter, such daughter shall have the barony. Skin. 436.

So, if he has issue several daughters, and all but one die without issue, the issue of such daughter has a right to have a summons to parliament. R. Skin. 441.

If he has several daughters, the dignity is suspended till all but one die without issue: or, the king may grant it to any of the daughters at his pleasure. Skin. 436.

But he is not a baron of the realm, if he dies before the return of the writ. Co. L. 16. b. R. 12 Co. 70.

If he never sits in parliament by force of the writ. Co. L. 16. b.

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So, a barony may be limited in the writ, to him and the heirs male of his body. 7 Co. 33. b.

[Where a man is created peer by writ, the creation is triable by the record only. Ld. R. 14. But where he is created by patent, his peerage may be tried by a jury. Semb. Ibid.]

[So, where nobility is gained by marriage, it shall be tried by a jury. D. Ld. R. 15.]

[So, the descents of a peerage shall be tried by a jury. D. Ld. R. 14.]

[The house of lords cannot try the title to a peerage so as to affect any rights it would give the claimant out of the house, except as a court of error. Semb. Ld. R. 15. 16.]

[Therefore, a peer may insist upon his right to be styled a peer in proceedings at common law, after the house has determined that he was not a peer, unless such determination was made in a cause removed into the house by writ of error. Semb. Ibid.]

(C 4.) By patent.

So, he may be created duke, marquis, earl, viscount, baron, or baronet, by letters patent. Co. l. 16. b.

And the first creation by patent was 10 Oct. 11 R. 2. Co. L. 16. b.

And by patent the dignity may be limited to him and his heirs, or the heirs of his body, or, heirs male of his body. Co. L. 16.

So, it may be limited only for life. Co. L. 16. b.

If a patent under the great seal of England creates one an earl, he shall be a peer of England. Sal. 510. Skin. 519.

Though a peer of Ireland may be created under the great seal, by express words. Sal. 510. Skin. 519. 520.

But the king cannot make any one a peer for years only; for it would go to his executor, or administrator. Co. L. 16. b.

So, if the king, by letters of safe-conduct, denization, &c. to a noble foreigner, names him by his title, this does not make him a peer of the realm, or noble here. 7 Co. 16. a. Calvin.

(C 5.) By parliament.

So, he may be made noble by act of parliament.

And the dignity may be entailed by parliament: as, the earldom of Oxford. Jon. 103.

But, if a noble foreigner be naturalized by parliament; that does not make him noble here. Dod. Nobility, 4.

Or, if a duke, baron, &c. of Scotland, or another kingdom, has a [*]son and heir born in England, by which he is a natural subject; he will not be noble here. 7 Co. 15. Calvin.

(C 6.) By marriage.

So, a dignity may be obtained by marriage: as, if a duke, marquis, earl, &c. marries: the wife shall be noble for her life. Co. L. 16. b.

And if a woman marries a duke, who dies, and afterwards she marries a baron, yet she continues a duchess. Co. L. 16. b. 2 Inst. 50.

If a duke, earl, &c. who has the dignity in fee, has not a son, but several daughters; the king may confer the dignity on him who marries any of the daughters, as he pleases. 12 Co. 111. Vide Parceners, (A 2.)

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But if a woman, noble by marriage, afterwards takes a husband under the degree of nobility; she shall lose her nobility. Co. L. 16. b. 2 Inst. 50. Dy. 79. b. Ow. 81.

Otherwise, if a woman, noble by descent, takes a husband not noble. Co. L. 16. b. 2 Inst. 50. Per Brook, Ow. 82.

Or, if a queen dowager takes a husband, noble or not noble; for she by her subsequent marriage shall not lose her dignity. 2 Inst. 50.

Yet if a woman, noble by descent, marries to an inferior degree of nobility, as if the daughter of a duke marries a baron, she shall have precedence only as a baroness. Ow. 82.

[(C 7.) By a lieutenant of a county.]

[The lord lieutenant of a county cannot confer honours, therefore his commission styling the party esquire, does not make him such. 1 Taunt. 510.]

(D) HOW TRIED.

If there be a dispute, whether a man be a peer of the realm generally, it shall be tried by the record of parliament. Co. L. 16. b. 7 Co. 15. Calvin. 9 Co. 31. a. 49. a. 19 Ass. pl. 24.

But where he claims by descent, though he ought to produce the patent of creation, it shall be tried by the country. Skin. 520.

If any one becomes heir to a barony in fee, and be not summoned to parliament, he may sue to the king by a petition of right. R. Skin. 432.

(E) HOW FORFEITED.

If a nobleman be attainted for treason or felony, he forfeits his dignity, and he and his posterity become ignoble. Co. L. 41. a. 391. b. Ow. 82.

But a dignity or nobility cannot be extinguished, except by act of parliament (if it be not forfeited). Skin. 437.

It cannot be aliened, or transferred to another. Jon. 123. Ca. Parl. 4. R. that a grant of it without the king's licence was void. 4 Inst. 126, 7.

It cannot be surrendered by deed or fine, to the king. R. Ca. Parl. 1. 11.

It cannot be taken away by the order of the lords in parliament. R. Sal. 511.

[*] It shall not be extinguished by the acceptance of another dignity or title. Skin. 437.

So, it shall not be lost by non-claim: for the statutes of limitations do not extend to it. R. Skin. 437.

(F) THE PRIVILEGE OF PEERS.

(F 1.) To be tried by peers.

All the barons of parliament shall be tried for treason, felony, misprision, or as accessory, at the suit of the king by their peers. By Mag. Chart. 9 H. 3. 29. *non super eum ibimus, &c. nisi per legale iudicium parium suorum.* 2 Inst. 49. 9 Co. 30. b. Sta. 152, 153. Vide Parliament, (L 16, &c.)

So, all of the nobility who are peers of parliament.

So, by the common law, which is now affirmed by the st. 20 H. 6. 9. all duchesses, countesses, and baronesses, who are noble by descent, creation, or marriage. 2 Inst. 50.

And marchionesses and viscountesses, &c. though not named by the st. 20 H. 6. 9. 2 Inst. 50.

So, the queen consort or dowager. 2 Inst. 50.

And a peer cannot waive his trial by his peers. Kel. 56. in marg. Mo. 621. 1 Tr. 265. 2 Rush. 94. Vide post, (F 2.)

But the nobles of another kingdom, who are not barons of our parliament, shall not be tried by the peers of parliament. By the common law, confirmed by parliament, 4 Ed. 3. 2 Inst. 50. 7 Co. 15, 16. Calvin. 3 Inst. 30. [Vide Scotland. (D 6.)]

Nor, a woman, noble by marriage, who has lost her dignity by a subsequent marriage under the degree of nobility. 2 Inst. 50. Vide ante, (C 60.)

Nor, an archbishop, or bishop; for they are not peers inheritable; Seld. J. P. if he be not accused in parliament; 4 Seld. 3 vol. 2. p. 1541. 3 Inst. 30. for they make proxies after plea, and withdraw themselves. 3 Inst. 31.

So, a baron of parliament shall not be tried by his peers in an appeal, which is the suit of the party. 2 Inst. 49. 9 Co. 30. b. Sta. P. C. 152. a. 10 Ed. 4. 6. b. 3 Inst. 30.

Nor, in *præmunire*, or other case, except treason, felony, or misprision. 1 Bul. 198. 3 Inst. 30.

So he may be indicted for treason, felony, or misprision by jury. 2 Inst. 49.

And upon such indictment in B. R. he may plead his pardon there. 2 Inst. 49. R. 1 Rol. 297.

And, if he does not appear, process issues there, and he may be outlawed upon it, *per judicium coronatorum*. 2 Inst. 49.

So, the indictment shall be before B. R. or commissioners appointed, by a jury of the county where the offence was committed. 3 Inst. 28.

[Or, before justices of oyer and terminer. Vide Duchess of Kingston's case, Cowp. 283.]

[And on certificate of an indictment being found, warrant may be granted by a judge of B. R. to arrest him; and on the arrest, B. R. may grant a *habeas corpus*, on the return of which they may let him to bail on [*] recognizance to appear as well in B. R. as before the king in parliament. Vide the Form of the Recognizance, Cowp. 284.]

But he cannot confess the indictment, or plead not guilty in B. R. 2 Inst. 49.

And before plea the king shall make an high steward, who may arraign him, or transmit the indictment by *certiorari* to parliament. R. Hut. 131.

By the commission to the high steward, the indictment is recited, and power given to him to receive the indictment, and to proceed *secundum legem Angliæ*; and a command to the peers to attend, and to the lieutenant of the tower to bring the prisoner, and a *certiorari* of equal date with the commission, or later, to remove the indictment before him *indilute*. 3 Inst. 28. Vide 1 H. 4. 1.

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(F 2.) The manner of trial.

At the trial of a peer, the king constitutes an high steward *hac vice*. 3 Inst. 28. 1 H. 4. 1. a. De quo vide Officer, (E 5.)

The high steward by warrant requires which serjeant at arms he pleases to summon the peers named in the warrant, to be at Westminster on such a day, to try, &c. Mo. 621. Sta. 152. 3 Inst. 28.

So, by warrant he requires the lieutenant of the tower to bring his prisoner. Mo. 621. 1 H. 4. 1. a. 3 Inst. 28.

And by letter, the judges are required to be present, who attend in scarlet, &c. Keil. 54.

And a writ goes out of chancery to the lieutenant of the tower, to bring the prisoner as the high steward shall appoint. 3 Inst. 28.

And peers in commission to find the indictment, may be upon the trial. R. Keil. 58.

A precept by the high steward to the serjeant to summon *tot. et tales proceres, &c. per quos, &c.* names none particularly. 3 Inst. 28.

But they ought to be twelve or more. 3 Inst. 28. 30.

At the day appointed the commission is read. Mo. 621. Sta. 152. 3 Inst. 28.

Then the peers are named according to the summons returned. Mo. 621. 3 Inst. 28, 29.

The prisoner cannot challenge any peer. R. 1 Tr. 366. 3 Inst. 27. 2 Rush. 94. Vide infra.

The peers, who appear, take their places according to their dignity. Mo. 621. 3 Inst. 28, 29. Sta. 152.

And afterwards the prisoner is brought to the bar. Mo. 621. Sta. 152. 3 Inst. 29.

And then the indictment is read. Mo. 621. 3 Inst. 29. Sta. 152.

And the prisoner arraigned. 3 Inst. 29. Sta. 152.

Afterwards the prisoner ought to plead, otherwise he stands mute. R. 1 Tr. 366. Vide infra.

If he pleads not guilty, issue is joined upon it. 3 Inst. 29. Vide infra.

And there needs no counsel for this; but if he pleads matter of law, counsel shall be assigned him. 3 Inst. 29. 2 Rush. 94. 1 Tr. 366.

If the prisoner does not appear, the same process shall be against him as upon another indictment, till he be outlawed. 3 Inst. 31.

After the indictment read, the peer ought to plead; otherwise judgment shall be against him. Keil. 57. 1 T. R. 366.

[*] If he pleads not guilty, he puts himself upon his peers. Mo. 621. Sta. 152. 3 Inst. 29. Vide supra.

And he cannot waive the trial by his peers, or challenge any of them. Mo. 621. Keil. 56. 3 Inst. 30. Vide Parliament, (L 17.) Vide ante, (F 1.) Vide supra.

And he need not have time allowed for pleading, though the indictment be long. Keil. 56.

If he does not plead, but confesses the indictment, judgment shall be immediately against him. 1 H. 4. 1. a.

After plea, the king's serjeants and attorney immediately give evidence against him; and then the prisoner shall answer to it. Sta. 152. 3 Inst. 29.

Then the constable with his prisoner retires, while the peers consult of their verdict. Sta. 152. b. 3 Inst. 29.

The judges may be asked their opinions in any point: for they are present for the assistance of the court. Keil. 54.

And therefore, if the high steward asks a question, they ought to answer, though it be in the absence of the prisoner. Keil. 54.

So, they may deliver their opinion upon a question proposed in point of law, in the absence of the prisoner. Dub. Keil. 54.

But they ought not to deliver their opinion, before the trial of a criminal case triable before them. 3 Inst. 29.

If the peers, after evidence, being in consult, desire to speak with any of the judges; with assent of the high steward he may go to them. Keil. 54.

But the judges ought not to deliver any opinion in point of law, but in open court, Keil 54., in the presence of the prisoner. 3 Inst. 29.

And they ought not to speak with the king's counsel privately upon it. 3 Inst. 30.

And therefore, if the peers, in consulting of their verdict, desire to speak with a judge, and then ask his opinion in law, he ought to inform them, that he cannot deliver a private opinion, nor without conference with the other judges. R. Keil. 54.

If the peers in consulting, &c. desire to speak with the high steward; he cannot speak with them but in the presence of the prisoner. R. Keil. 57. 3 Inst. 29.

The peers may eat and drink, after evidence given, before verdict. 1 Tr. 366. 2 Rush. 95.

But the peers ought not to separate or adjourn after evidence, before their verdict. 1 Tr. 366. 3 Inst. 30. 2 Rush. 95.

After a major part of the peers in consult are agreed of their verdict, they again take their places, and the high steward asks of the lowest, and so each *seriatim*, whether the prisoner be guilty, who answers without oath, guilty, or, not guilty, upon his honour. Sta. 152. b. 10 Ed. 4. 6. b. 1 H. 4. 1. a. 3 Inst. 30.

Then the high steward asks for the prisoner, and declares the verdict to him, and gives judgment accordingly. Sta. 152. b. for the verdict is given in the absence of the prisoner. 3 Inst. 30.

If they do not agree, the court may adjourn to the next day; though it is not usual. Keil. 57. 3 Inst. 31.

And in such case the peers need not continue together, as other juries; but may retire to their houses. R. Keil. 57.

[*](F 3.) As to oath, arrest, &c.

So, a peer, generally, shall not be upon oath in trials before them, or when he answers in any court, as a defendant. Jon. 154. Vide Serement, (C.)

So, he shall not be put upon a jury, or assise. Jon. 153. 9 Co. 49. a. Reg. 179. b. 48 Ass. 6.

And, if he be, he shall have a writ for his discharge. Reg. 179. b. R. 48 Ed. 3. 30. b. Dy. 314. b.

So, an attachment does not go against a peer for a contempt in disobeying an injunction, &c. Seld. 3 vol. 2. p. 1543.

So, a peeress, by marriage or descent, shall not be arrested; for a *capias* does not lie against her. R. 6 Co. 52. b.

So, a peer shall not be arrested in debt or trespass; for a *capias* does not lie against him. 9 Co. 49. a. 6 Co. 52, 3. Hob. 61.

And, if arrested by a process which names him a peer, a *supersedeas* shall go. Sal. 512. [2 Ld. Raym. 1247. S. C.] 4 Inst. 126. F. N. B. 247. C. [1 Vent. 298. B. R. M. 43 Geo. 3. 3 East, 127.]

So, if he has sat in parliament as a peer. Sal. 512. [2 Ld. Raym. 1247. S. C.]

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[The attorney was committed for suing out the process. 1 Vent. 298.]

But if he never sat as a peer, nor be named so, he ought to plead. Sal. 512. for there shall not be a *supersedeas*; but perhaps he may have a writ to the justices, mentioned F. N. B. 247. if he be a peer.

So, a peer shall be in execution upon a statute-staple, statute-merchant, or recognizance. R. 2 Leo. 173, 4.

So, execution shall be against his body upon a judgment. Dub. 2 Leo. 173.

So, a *capias* lies against a peer in an *homine replegiando*. Hob. 61.

So, a peer shall find bail upon a *habeas corpus* to remove a cause. R. 2 Leo. 173.

So, a *capias* lies against a peer for an offence to the king immediate; as, for felony. Seld. 3 vol. 2. p. 1546.

So, for a rescous made, &c. Seld. 3 vol. 2. p. 1546.

So, a *capias* lies against an earl, baron, &c. in Ireland.

And against a bishop of Ireland; though he is a bishop of the universal church. Pal. 345.

[It is irregular to sue a peer by bill of Middlesex, such bill containing a *capias*, which does not lie against a peer; and if he be so sued jointly with others, the proceedings as to him will be set aside on motion, without leaving him to plead his privilege in abatement. Semble, if the process describes him as a peer, the affidavit on which the motion is founded need not state that he is one. 3 M. & S. 88.]

[Peers may be sued in B. R. by original bill. Cowp. 844.]

[A peer cannot be attached for non-performance of an award, though with his consent. 7 T. R. 171.]

[A *latitat* will be set aside where the defendant is styled 'a baron,' in the *precipe* filed on issuing the writ. 3 East, 127.]

[If an Irish peer be sued by bill, the court will not set aside the proceedings on motion, but leave him to plead his privilege in abatement. 1 Moore, 410.]

[Even admitting that a peer of parliament cannot be sued in the K. B. [*]by bill; he waives the objection by pleading in chief. 2 H. B. 267. 299. 2 Anst. 356. 3 B. & P. 7.]

[Occasional waiver by the defendant, of the privilege of peerage, does not waive it in an action at the suit of another plaintiff. 4 Taunt. 668.]

[The privilege of franking is not extended to Roman Catholic peers. 2 B. & P. 139.]

DIOCESE.

Vide PARISH, (A).—PROHIBITION, (F 9.)

DISABILITY.

Vide ABATEMENT, (E 1, &c.)—ABILITY.—ALIEN, (C 4.)—CAPACITY.—CHANCERY, (I 1.)—CONDITION, (M 2, &c.)—POPERY, (B 7, &c.)

DISCEIT.

Vide DECEIPT.

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DISCENT.

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(A) WHEN A MAN TAKES BY DESCENT.

Every estate of inheritance which a man has, he takes by descent or purchase. Co. L. 13. b.

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In all cases where a man derives the estate from his ancestor, he takes by descent: as, if tenant in fee-simple, or tail, dies, his heir takes by descent. Co. L. 13. b.

[A charge on the estate does not alter the manner of the heir's taking the land; but if the tenure or quality of the estate be altered, the heir is a purchaser. 1 Bl. Rep. 22.]

[Where a man devises lands to his right heirs absolutely, the heir may take by descent, as being the better title; but where the lands so devised are subject to a charge, he must take under the will, that he may not defeat the will. Per Ld. Mansfield, C. J. B. R. E. 16 G. 3. Cowp. 422.]

So, where the ancestor has an estate for life, and afterwards a limitation is to his right heirs, the heir takes by descent: as, if a feoffment be to the use of A. for life, remainder to B. in tail, remainder to the right heirs of A.; the heir of A. takes by descent. Co. L. 22. b. 319. b. R. 2 Co. 91. b. Mo. 284. 719. Pol. 56. 1 Rol. 627. l. 20. 25. 2 Rol. 417. l. 10.

So, if it be to A. and B. for life, remainder to the right heirs of him who dies first, and A. dies; his heir takes by descent, though the remainder could not vest before the death of A. Co. L. 378. b. D. cont. Lit. 258.

So, if it be to the use of A. for years, if he so long lives, and afterwards to B. for life, and afterwards to the right heirs of A. Cont. Mo. 719. Poph. 3. 2 And. 138. R. acc. 3 Lev. 406. Dub. 4 Mod. 384. But the court inclined cont.; and in the case 3 Lev. 406. the limitation was to A. and his heirs. Cont. Co. L. 319. b. Semb. acc. where it was limited to the trustees for the life of A. Eq. R. 21.

So, though the estate for life in the ancestor be created by act in law: as, if a feoffment be to the use of another for life, remainder to A. in tail, remainder to the right heirs of B. the feoffor; because B. cannot have an heir during his life; and by the st. 27 H. 8. the possession is executed [*] to the use, the law creates an use to B. for his life, till the future use comes in esse; and therefore the heir takes by descent. Co. L. 22. b. Mo. 284.

Or, if a man covenants to stand seised to the use of A. in tail, and afterwards to the heirs male of himself; the law creates an use in the covenantor for his life, and his heir male takes by descent. R. 2 Mod. 211. 4 Mod. 382.

Or, to the use of his heirs male by a second wife; he has immediately an estate-tail, and the son by the second wife shall take by descent. R. 2 Lev. 79. 1 Mod. 121. 159.

So, if a man upon a conveyance limits a void remainder, by which the reversion results to himself, his heir takes by descent: as, if a man demises for life, remainder to his right heirs, the remainder is void; for he cannot make his heir a purchaser, where he does not part with the whole estate out of himself. Co. L. 22. b.

So, if a fine *sur grant & rendre* be to a husband and wife, and the right heirs of the husband (where the husband was sole seised before), who render to A. for the life of the husband, remainder to B. for life, remainder to the right heirs of the husband; the remainder to the right heirs is void: for he cannot make his right heir a purchaser, where he does not part with the whole estate out of himself; and therefore the reversion was in the husband. 2 Rol. 414. l. 45.

So, if by bargain and sale land be conveyed to A. and his heirs, and A. dies before enrolment, the heir takes by descent. Vide Bargain and Sale, (B. 9.)

So, if a man covenants to stand seised to the use of B. and his heirs, upon a contingency, and B. dies before, and then the contingency happens; [414]

the use rises to the heir, who shall take *quasi* by descent. 2 Rol. 794. l. 45. R. Rol. 59. 66.

If A. covenants to stand seised to the use of B. in tail, and for default of issue, to his own heirs male; his younger son, after the death of the elder leaving a daughter only, takes by descent. R. 2 Mod. 211.

[So, if a man grant to A. B., remainder to his own heirs male; his heirs male take by descent. But if such a limitation be made by will, or by a third person by deed, the heir male takes by purchase. 2 Bl. Rep. 687. 5 Burr. 2615.]

If A. limits an estate to his wife for life, and afterwards by a subsequent deed limits it to the heirs of the body of his wife; she takes an estate-tail: for these estates are consolidated, and the heir of the wife does not take by purchase. Dub. 2 Ver. 489.

So, if a devise be to an heir of the same estate which he would have by descent he shall take by descent. Vide Devise, (K).

So, if a devise be to A. for life remainder to the heir of the devisor in fee; the heir takes by descent, though it be a remainder: for it makes no alteration in the nature of his estate. R. 1 Rol. 626. l. 35.

So, if a devise be to A. till his heir attains the age of 24, and then to him in fee, and that his wife shall have a third part for her life; and if he dies before 24, to his wife for life; and if his heir has no issue, to his daughter in tail. 1 Rol. 626. l. 45.

So, if a copyhold be surrendered to the use of his will, and then he devises to A. for life, and afterwards to the heir of his body for ever; the heir of A. takes a fee by descent. R. 1 Rol. 627. l. 5.

[*]So, if a devise be to A., his younger son in tail, and if he dies without heir, to his own right heirs; the eldest son takes by descent. R. 1 Sal. 233, 4.

[One alone of several co-heirs cannot take from the common ancestor by descent. Ld. R. 829.]

[Therefore if he devises lands to one of them, the whole shall pass by the devise, and no part by descent. R. Ld. R. 829.]

[If a man devise lands to his heir, unless the devise alters the tenure or quality of the estate, it shall pass by descent not by the devise. R. 4 Ford, 264.]

[The charge of an estate with the payment of debts and legacies does not alter its tenure or its quality. 4 F. 264.]

[Therefore if a man devises an estate so charged to his heir at law, he shall take it by descent. 4 Ford, 264.]

(B) WHEN BY PURCHASE.

But a man takes by purchase where the estate first vests in him; and he does not derive it from his ancestor. (Vide Co. L. 3. b. 1 Co. 95. Shelly).

As, if land be limited to A. for life, remainder to the right heirs of B., his right heir takes the remainder by purchase. 1 Rol. 627. l. 15. R. 3 Leo. 14.

So, if a scoffment be to B., to the use of A. in tail, and afterwards to the right heirs of B. For it was a remainder, and not a reversion, though B. was the feoffee. Semb. Co. L. 22. b.

So, if a devise be to A. for life, and after his death to his next heir male and the heirs male of his body; his son takes the remainder by purchase. R. 1 Co. 66. b.

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So, where a man takes by executory devise, he takes by purchase. Vide Devise, (N 16, 17.)

So, a devise to A. for the life of B., and then to the heirs male of B. then living; the son of B. then living, being godson to the testator, shall take, for it is *designatio personæ*. R. per 3 J. in B. R. which was reversed in the exchequer chamber, and afterwards affirmed in parliament. Ray. 330. 2 Jon. 99. 1 Vent. 334.

So, if a copyhold be surrendered to A. and his heirs, and A. dies before admittance, by which his heir is admitted; he takes by purchase, for there was nothing in A., who was never admitted. R. 1 Rol. 627. l. 30.

So, if an estate be limited to B. *per auter vie*, remainder to A. for life, remainder to the right heirs of B.; if he dies before A., the remainder is not vested in B. though he has a freehold: for if he dies before A. it shall never take effect. Lit. 258.

So, if it be limited to A. and B. for their joint lives, and afterwards to C. for life, remainder to the right heirs of B. 2 Rol. 418. l. 10.

[The words, "heirs, heirs male, or heirs of the body," are not always words of limitation; they may be construed words of purchase, either in will or deed. M. 1 G. 3. 2 B. M. 1100. Vide Devise, (N 24.)

[A devise to the heir of A. may be good as *designatio personæ*. 2 Blk. 1010.]

[The heir may take as special occupant under the term "heirs." 4 T. R. 229.]

[*](C) TO WHOM A DESCENT SHALL BE.

(C 1.) To the next in blood.

If a man dies seised in fee, the descent shall be to his eldest son.

If he has no son, to all his daughters in coparcenary.

If he has no issue, to his eldest brother. Lit. s. 5.

If he has no brother, to all his sisters.

If he has no issue, nor brother, nor sister; to his next collateral cousin of the whole blood. Lit. s. 2.

But land shall not descend to the next in blood, if there be any nearer *jure representationis*: as, if B. has issue C. and D., and C. dies in the life of his uncle, and then the uncle dies: his estate shall descend to the son of C., and not to D. though he is nearest in blood. Co. L. 10. b. 3 Co. 41. a.

So, all the posterity of C. shall inherit before D. or his issue. Co. L. 10. b.

So, by the Jewish law. Seld. de Succ.

So, land shall not descend to the father, or other lineal ancestor, though he be nearest in blood; but shall descend to the uncle, or other collateral cousin. Lit. s. 3.

And this is a maxim peculiar to the common law. Lib. Rub. cited Co. L. 11. a. cont. Acc. 1 Vent. 414, 415.

Yet if land descends from a son to his uncle, after the death of the uncle without issue, it may descend from him to the father. Lit. s. 3.

So, likewise if an estate be granted to a son for life, remainder to the next of his blood; the remainder shall be to the father, and not to the uncle. Co. L. 10. b.

So, if an estate be limited to A. for life, remainder to his next of blood in fee; A. has no issue, his brother has issue B. and C. and dies; and B. also has issue, and dies, and then the death of A. happens; the remainder

vests in C., for he is the nearest of blood to A. though the issue of B. shall be his heir. Co. L. 10. b.

[One seised in fee of lands charged with 50*l. per annum* to his mother she consents, on his marriage, to release the whole of the lands, and take a rent-charge on part. They join in a fine for that purpose, and declare trusts to settler for life to sons in tail male, remainder to A. and B., brothers, severally, in tail male, remainder to daughters of the marriage, and remainder to settler in fee; there was no issue; afterwards a mortgage and fine *sur concessit*. The mortgagee purchased in fee, and took a fine *sur conusance*, &c. Mortgagee died; and held, that the son of A., his brother, should take.]

(C 2.) Though he be posthumous.

So, if a man dies seised of land (his wife being *privement enseint*), and his land descends to his daughter, brother, uncle, &c. and afterwards a son is born, or other nearer heir; the after-born issue shall enter upon the daughter, brother, uncle, or other remoter heir. Co. L. 11. b.

So, if land descends to a daughter, and another daughter is afterwards born, she shall be parcener with her sister. Co. L. 11. b.

So, if A. has issue B. and C., and B. dies, his wife *privement enseint* with a son, then A. suffers a recovery to him and the heirs of his body, and dies before execution, and C. enters; the son of B. born afterwards [*] shall enter upon him: for C. takes by descent, and the execution relates to the recovery, which was in the life of A. R. 1 Co. 98. 106. Shelly.

So, if husband and wife seised in tail general, have issue a daughter; then the husband dies, his wife *privement enseint*, and the wife aliens, upon which the daughter enters by st. 11 H. 7. 20. A son afterwards born shall enter upon her: for, by the statute, the daughter was in *quasi* by descent. 3 Co. 61. b.

So, if a condition be broken in the life of the feoffor, who dies before entry; and afterwards his daughter, as heir, enters; a son born afterwards shall enter upon her. 1 Co. 99. a.

So, if a man, entitled to enter upon consent given to a ravisher, dies before entry. 1 Co. 99. a.

Or, to enter by force of a remainder. 1 Co. 99. a.

But if an estate vests in a daughter, brother, &c. by purchase, and not by descent; a nearer heir, born afterwards, shall not divest it: as, if a remainder be limited to the right heirs of B., who dies, his wife *privement enseint*, and then the remainder happens. 9 H. 7. 25. a. 1 Co. 95. a. R. 1 Sal. 227. 2 Ver. 579. Skin. 430. R. cont. in Parl. 4 Mod. 282. 3 Lev. 408.

So, if it vests upon a contingency. Cro. Car. 412.

So, if a brother, &c. by his entry be remitted. R. 3 Leo. 2.

Or, upon a forfeiture for a condition broken, consent to a ravisher, &c. 5 Ed. 4. 6. a. 1 Co. 95. a.

So, if a daughter, &c. pays money, or performs a condition, whereby the estate is preserved. R. 1 Co. 95. a. 99. a. R. Cro. Car. 87.

And now by the st. 10 & 11 W. 3. 16. a son or daughter born after the death of the parent shall take in the same manner as if born in his lifetime, though no estate be limited to preserve contingent remainders, &c.

(C 3.) To the most worthy.

So, it is a rule, that a descent shall be to the most worthy in blood: and [*417]

therefore, if a man seised of land has issue several sons and daughters; the male issue shall be preferred, for the male is the most worthy. Vide Co. L. 14.

If there are several sons; the descent, by the common law, shall be to the eldest.

If there be not any issue, but a man has several brothers: the descent shall be to the eldest brother. Lit. s. 5.

So, if a man purchases land, and dies; all of the blood of the part of his father shall inherit before those of the blood of the part of his mother: for the blood of his father is the most worthy. Lit. s. 4.

And the father has also two bloods in him; the blood of his father, and of his mother. Co. L. 12. a.

And all of the blood of the father of the part of his father, shall inherit first; and then those of the blood of the father of the part of his mother. Co. L. 12. b.

So, if the same person has title by two bloods, and he cannot take by the most worthy, he shall not take by the other, but the land shall escheat: as, if A. attainted has issue B. and C., and the eldest purchases, and dies; if C. should take by mediate and not by immediate descent, though he has the blood of A. and his wife, if he cannot take as heir to [*]A., he cannot as heir to the wife; though both bloods, viz. of the father and mother, were inheritable to B. 1 Vent. 426.

(C 4.) To the whole blood.

So, a descent shall be to the heir of the whole blood; and therefore, if a man has issue by divers ventres, and the eldest purchases lands, and dies without issue; his half brother shall not inherit to him. Lit. s. 6.

So, none shall inherit an estate in fee-simple if he has not in him the blood of the father and mother. Co. L. 14. a.

And therefore, if the eldest brother purchases and dies without issue, the descent shall be to his sister, uncle, or other next cousin of the whole blood, and not to the half brother. Lit. s. 6. 7. 1 Vent. 424. Dy. 342. a.

If a man pleads, that he is heir of the part of his mother, he ought to shew that he is heir of the whole blood. 1 Ver. 442.

But if the eldest brother purchases, and dies without issue, and his uncle, &c. enters as heir, and dies; the half brother may inherit to him; for he is of his whole blood. Lit. s. 8.

[If lands descend to two daughters of the father by the first ventre, and after his death an infant son be born of a second ventre, the mother at that time residing in part of the premises, and receiving rent for the other parts, both before and after the birth of her son, though the son die within a short time (as five weeks and three days), this is a sufficient actual seisin in the infant son, to make a *possessio fratris*; so that the lands shall not descend from him to his sisters of the half blood, but to a more remote heir of the whole blood. 2 Bl. Rep. 938. 3 Wils. 516.]

(C 5.) An heir ought to be of the blood of the first purchaser.

None can be heir to lands, who is not of the blood of the first purchaser. Co. L. 12. a.

And therefore, if a man inherits lands as heir to his father and dies without issue, it shall descend to his heir of the part of his father; and the heir of the part of his mother shall never take, for he is not of the blood of the

first purchaser : and if there is no heir of the part of his father, the land escheats. Lit. s. 4.

So, if he inherits as heir to his mother, it shall descend to the heir of the part of the mother : and if there be not any such, the land escheats. Lit. s. 4.

So, if A. purchases land and marries B., his issue, and all of the blood of A., may inherit ; but none of the blood of B. shall ever inherit. Co. L. 12. a.

So, if B. was the purchaser, none of the blood of A. could ever inherit. Co. L. 12. a.

(C 6.) When he takes as heir of the part of the mother.

If a man has land as heir to his mother, and dies without alteration of his estate, the heir of the part of his mother shall always take.

So, if he makes a feoffment to the use of himself and his heirs ; such use is in him as the ancient use, and follows the nature of the land ; and therefore, the heir of the part of the mother shall inherit. Co. L. 13. a. Dy. 134. 2 Rol. 780. l. 35.

[*] Though the use be expressly limited to him and his heirs, as well as where it results to him by operation of law. Cont. Dy. 134. a. Qu. 2 Rol. 780. l. 35. R. acc. 3 Lev. 406. Sal. 591. Eq. Ca. 186.

Though a feoffment, fine, &c. be declared to the use of A. for life, and afterwards to the use of him and his heirs : for the fee is the antient use and reversion. 3 Lev. 406.

Or, to the use of himself for life, or for 99 years, and afterwards to A. for life, and afterwards to him and his heirs. R. 3 Lev. 406.

Or, to the use of himself for life, then to his wife for life, then to the first, second, and other sons in tail, and afterwards to him and his heirs ; the reversion is the antient estate, and shall descend to the heir of the part of his mother. R. in C. B. Tr. 4n. Sal. 591. (Com. 160.)

Though there be a fine and recovery, by which the use arises out of the estate of the conusees ; for they make but one conveyance. R. Sal. 591. (Com. 160.)

So, if a man seised as heir of the part of his mother, makes a feoffment upon condition, and afterwards enters for the condition broken ; the heir of the part of his mother shall take. Vide Co. L. 12. b.

So, if the feoffor dies, and his heir enter ; the heir of the part of the mother shall afterwards have the land. Co. L. 12. b.

If such a man makes a lease for life or years, or a gift in tail, rendering rent ; the reversion descends to the heir of the part of the mother, and the rent, as incident to the reversion. Co. L. 12. b.

So, if before the *st. quia emptores terrarum* he had made a feoffment in fee of parcel of his manor, rendering rent. Co. L. 12. b. 8 Co. 54. a.

So, if he devises to A. for years, remainder to B. in fee, who was heir of the part of the mother ; he shall have it by descent. R. 3 Lev. 127.

So, if a man has a rent seck as heir of the part of his mother, and the grantor grants a distress for rent, by which it becomes a rent-charge ; it shall go to the heir of the part of the mother. Co. L. 13. a.

So, if he has a manor, and a tenancy escheats. Co. L. 13. a.

If he recover upon voucher, the heir of the part of the mother shall have the land recovered. Co. L. 13. a.

[A. seised in fee devises to his wife in fee, and dies so seised, leaving B. his widow, and C. their only child, his heir at law. B. previous to her

second marriage, by lease and release conveys to trustees to the use of herself for life, to trustees for a term, remainder to C. for life, to trustees to preserve, &c. ; remainder to C. in tail, in default of issue, to such person as B. by deed or will, notwithstanding coverture, shall appoint; for want of appointment, to her heirs for ever. B. by will duly executed, during coverture, devises all her real and personal estate, &c. subject and charged with payment of debts and legacies, to C. ; B. dies, leaving C. her only child, and heir at law : he does not take from his mother by purchase, but by descent ; and consequently, on his death, it descends to his heir *ex parte materna*. R. per B. R. unanimously, on a case out of chancery ; and decreed accordingly. M. 33 G. 2. 2 B. M. 880.]

[If the legal interest in land descend in fee simple *ex parte materna*, and the equitable interest in fee simple *ex parte paterna*, or *vice versa*, the equitable shall merge in the legal estate, and both follow the line through which the legal estate descended. Dougl. 771.]

[Devise of real and personal estate to testator's wife, in trust for the [*]education of his daughter till twenty-one, and in case she dies under twenty-one, then to his wife. The mother dies first, then the daughter dies under twenty-one. The heir of the daughter *ex parte materna* shall succeed. 15 East, 174. 2 N. R. 383.]

[If a tenant *ex parte materna* make a feoffment to the use of his maternal heirs, and the feoffee re-enseoff him expressly to the use of those heirs, yet the re-enseoffment shall enure to the paternal heirs. Doug. 773.]

[If a copyholder in fee *ex parte materna*, surrenders to B. in fee, who surrenders to A. in fee, the line of descent is broken, as in the common case of feoffment and re-feoffment ; and the copyhold will descend to the heirs *ex parte paterna*. 7 T. R. 103.]

[The right heir of husband and wife being in law but one person, is the child of both, and not the heir of the survivor, or the heirs of each. 1 T. R. 630.]

(C 7.) When not.

But if a man takes by purchase, the heir of the part of his father shall inherit, and not the heir of the part of his mother.

And therefore, if a man seised as heir of the part of his mother makes a feoffment, and takes back an estate to him and his heirs ; the heir of the part of his father shall take : for it is a new purchase. Co. L. 12. b.

If he makes a feoffment, rendering rent to him and his heirs ; the rent goes to the heir of the part of his father. Co. L. 12. b.

If husband and wife have issue B., and land is given to A. for life, remainder to the heirs of the wife ; B. takes as a purchaser : and therefore the land shall descend to the heir of the part of his father. Co. L. 13. a.

If husband and wife levy a fine of the land of the wife *sur grant et render* to them in tail, remainder to the heirs of the husband ; the heir of the part of the husband shall take : for it is as a feoffment and re-feoffment. R. 1 al. 337. Sho. 92. Carth. 140.

If a man seised of the part of his mother levies a fine *sur grant et render* to himself, he shall be afterwards seised of the part of his father. Mod. Ca. 45.

[If A. has a lease to her and her heirs for three lives, and devises it to her daughter an infant, and directs the guardian to make purchases for the infant's benefit, the guardian on the death of a life takes a new lease for three new lives, and the infant dies ; the new lease shall not go to the old
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uses, to the heirs *ex parte materna*, but to the heirs of the infant *ex parte paterna*. T. 1739, 1 Atkyns, 480.]

[If a tenant in tail of lands by purchase under a settlement made by an ancestor *ex parte materna*, with the reversion in fee by descent *ex parte materna*, suffer a common recovery to the use of himself and his heirs, the lands will descend to his heirs *ex parte paterna*. H. 16 G. 2. 2 Str. 1179. 1 Wils. 2. 66. Willes, 444. B. R. H. 33 Geo. 3. 5 T. R. 104.]

[Lands cannot descend to the heir *ex parte materna* if the person from whom they descend was a purchaser. 3 F. 126.]

[Therefore, where a man took an estate tail by purchase, of the gift of his maternal grandfather, from whom he also had the reversion in fee, and suffered a recovery to the use of himself in fee, it was held the estate [*] could not descend to his heir *ex parte materna*, because he had it by purchase. 3 F. 126. P. C.]

(C 8.) Must be heir to him who was last seised.

A man, who takes by descent, ought to be heir to him who was last seised of the actual freehold and inheritance. Co. L. 11. b. 15. a.

And therefore, if a man dies without issue, and his uncle as his heir enters, and dies; the father may be heir to the uncle his brother, who was last seised: but, if the uncle was not seised, the father cannot be heir. Co. L. 11. b.

So, if A. dies having a son and a daughter by one ventre, and a son by another, and the son by the first ventre becomes actually seised, and dies; his sister shall be heir to him: but if he be not seised, the son by the second ventre shall be heir to his father. Co. L. 15. R. Jon. 361.

And in the last case, the descent is immediate from the father to the son by the second ventre. R. Jon. 361.

[If lands are settled to the use of A. and B. and the survivor for life, then to the heirs of the body of B. by A., and for want of such issue to A. his heirs and assigns; and they have issue only a daughter C., B. dies, A. marries again, and has issue only a daughter D., C. marries, A. gives possession of the premises, but without conveyance, A. dies, then C. dies, leaving a son who dies; A. had no brother, only a sister, who enters; D. has no title to the lands. H. 30 G. 2. 2 Wils. 45.]

So, a man who claims an use, seigniority, rent, advowson, or other hereditament, ought to be heir to him who was last seised. Co. L. 14. b.

So, he who claims a copyhold. Vide Copyhold, (D 1.)

(C 9.) What shall be a possession.

And therefore, where there was an actual seisin by an uncle, or brother, the father or sister may be heir; as, if the uncle or brother made an actual entry into the land. Co. L. 11. b. 15. a.

If he entered into a parcel, generally, it is sufficient for all the lands in the same county. Co. L. 15. a.

If the brother was within age, an entry by his guardian is sufficient. Co. L. 15. a.

[A. died seised, leaving two infant daughters by different ventres; it was holden, that an entry generally by the mother of the youngest daughter as her guardian in socage, constituted a sufficient seisin in the eldest infant daughter, to carry the descent of her moiety on her death to her heirs. B. R. M. 38 Geo. 3. 7 T. R. 386.]

If the land was in lease for years, it is sufficient, though the brother did [*421]

not enter, nor take the rent; for the possession of the lessee was his own possession. Co. L. 15. a. 4 Co. 21. a. R. 1 Vent. 261.

So, if it was a lease for life, and the brother received the rent after the death of his ancestor. Semb. Co. L. 15. a.

[The rule of *possessio fratris* does not apply to estates-tail, nor to inheritances in fee-simple without an actual possession of the brother of the whole blood. B. R. E. 39 Geo. 3. 8 T. R. 211.]

[If tenant for life, with power to let leases, make a lease to A. for three lives, *habendum* from the day of the date; the lease is void, as being a freehold to commence *in futuro*, A. tenant at will, and his possession is the possession of the lessor. M. 21 G. 2. 1 Wils. 176.]

[*]So, if a father devised land *in capite* to his wife for life, and she entered into the whole; it shall be a possession of a third part for the heir, who was tenant in common with her for this third part. R. Mo. 868.

[Where lands descended to two daughters of the father by the first ventre, and after his death, an infant son was born of a second ventre, the mother at that time residing in part of the premises, and receiving rent for the other parts, both before and after the birth of her son; and the son died at the age of five weeks and three days. Held, a sufficient actual seisin in the infant son to make a *possessio fratris*, so that the lands shall not descend from him to his sisters of the half blood, but to a more remote heir of the whole blood. 2 Blk. 938. 3 Wils. 516.]

(C 10.) What not.

But if the uncle or brother had not actual seisin, the father or sister shall not be heir: and therefore, if the uncle or brother dies before entry by him, his guardian, or lessee, &c. the son by the second ventre shall be heir. Co. L. 15.

So, if there be a lease for life, or a gift in tail, and he dies before receipt of rent. Co. L. 15. a. R. 1 And. 31.

So, if a descent be of a rent, and he dies before seisin of it. Co. L. 15. b.

Or, of an office, franchise, courts, common, &c. Co. L. 15. b.

So, if an advowson descends, and he dies before presentation. Co. L. 15. b.

So, if a dignity descends: for there cannot be a seisin of it. Co. L. 15. b. R. Cro. Car. 601.

So, if the crown, or the demesne lands of the crown, descend. Co. L. 15. b.

So, if an estate-tail descends: for it goes *secundum formam doni*. Co. L. 14. b. 15. b.

So, if the uncle, or brother be seised, but his seisin be defeated; as, if the wife of his ancestor recover dower, and survive him. Co. L. 15. b.

[The vesting of a reversion will not make such a *possessio fratris* as to convey the estate to the heir of the person in whom it vests. 3 B. & P. 651. denying 2 Blk. 1230.]

What advantages an heir shall have, vide in Chancery, (3 P 2, 3.)

(C 11.) Who cannot be an heir.—A monster.

But a monster, which has not human form, cannot take by descent, as heir. Co. L. 7. b.

(C 12.) A bastard, alien, &c.

So, a bastard cannot take by descent. Co. L. 8. a. Vide Bastard, (E—F).

Nor, an alien. Vide Alien, (C 1.)

(C 13.) A person attainted.

So, a person attainted for treason or felony cannot be heir to any one. Co. L. 8. a. St. P. C. 195. b.

So, none can be heir to a man attainted for treason or felony; for his blood is corrupted. Co. L. 8. a. St. P. C. 195. b.

[*]So, if a person attainted be pardoned, by the king; a son, born after the attainder and before the pardon, cannot be heir to him. (Vide St. P. C. 195. b.)

Nor, a son born before the attainder: for his blood, corrupted by the attainder, is not restored by the charter of pardon. Co. L. 8. a.

So, if a son born before the attainder survives his father, a younger son, born after the charter of pardon, cannot inherit, though his blood is not corrupted: for his elder brother is living, though not inheritable. Co. L. 8. a. Vide 1 Vent. 413. 417.

If a man, after an attainder, has two sons, and one of them purchases, and dies without issue, the other cannot be heir to his brother. Co. L. 8. a.

So, if a man attainted has a son, who purchases, and dies without issue, his uncle, &c. cannot inherit; for he ought to derive his blood by the mediation of the father, who was attainted. 1 Vent. 425.

And when the blood of the heir is corrupted, which hinders a descent to him, the land escheats. 1 Vent. 426.

But if a man be attainted, and afterwards has a charter of pardon, a son, born after the pardon, may inherit. Co. L. 8. a.

So, if a man attainted has two sons, one born before the attainder, and the other after a pardon, and the elder dies in the life-time of his father, the younger may inherit. Co. L. 8. a.

So, if a man before attainder has two sons, and one purchases, and dies; the other may be heir to his brother. Co. L. 8. a. 1 Vent. 425. Dub. Mod. 569.

So, if the grandfather be attainted, and the son purchases, and dies without issue, his uncle may inherit; for the attainder was paramount to him. 1 Vent. 425.

So, if there be a pardon by act of parliament, a son born before may inherit; for the corruption of the blood is purged. Vide Co. L. 8. a.

So, if the blood of the son be restored by act of parliament, the collateral heirs of the father may inherit him. R. 1 Vent. 420.

(C 14.) A father to a son.

So, inheritances cannot lineally ascend; and therefore a father cannot be heir to his son. Co. L. 10. b. Vide Lit. s. 3. Vide ante, (C 1.)

And that was the feudal law. Mad. 125.

But not the law of the Jews or Greeks. Per Hale, 1 Vent. 414.

Nor, of the twelve tables. Per Hale, 1 Vent. 414. Cont. Co. L. 11. a.

Descents are either lineal or collateral: and both, either mediate, or immediate. 1 Vent. 415.

The immediate lineal descent is from the father to his son: the collateral, from one brother to another. 1 Vent. 415. 423.

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The mediate when one derives his inheritable blood to another by the medium of a third person; as, in lineal descent if a son claims as heir to his grandfather, or great-grandfather, it shall be *mediante patre*, though the father be dead at the time of the descent. 1 Vent. 415.

So, in a collateral descent from a nephew to an uncle, or *e contra*, it shall be made *mediante patre*. 1 Vent. 415.

[*]When a descent shall be *secundum formam doni*, vide Estates, (B 7, 8.)

Where it ought to be derived wholly through males, or through females, vide Estates, (B 9.)

(D) A DESCENT WHICH TAKES AWAY ENTRY.

(D 1.) What shall be.

By the common law, if a man is seised of an estate of inheritance, and is disseised by another, and the disseisor hath issue and dies seised of the lands, they descend to his heir; and the entry of him, who had right, is hereby taken away. Co. L. 237.

And the entry shall be taken away where a man dies seised in tail, as well as in fee. Lit. s. 385, 386.

If he comes to the land by disseisin, abatement or intrusion; or by the feoffment, gift, &c. of a disseisor, &c. Co. L. 237. b.

If he in reversion or remainder, disseises the tenant for life, and dies seised. Co. L. 239. a.

If he in reversion or remainder, expectant upon a term for years, or an estate of tenant by statute or *elegit*, dies seised: for he is seised of the fee and freehold. Co. L. 239. b.

And a descent tolls the entry of all corporeal tenements, which lie in livery. Co. L. 237. b.

So, if he who dies seised, had but a seisin in law; as, if a disseisor of an infant dies seised, and then the infant attains his full age, and afterwards the heir of the disseisor, before his actual entry, dies. Co. L. 239. b.

If the descent be to an heir lineal, or collateral. Lit. s. 389.

(D 2.) What not.—If he does not die seised of the inheritance, and freehold also.

But a descent does not take away an entry, if he who died seised had only an estate of freehold. Lit. s. 38.

As, if tenant for life, or *pur autre vie* of the disseisor, dies seised.

If a disseisor leases to B. and his heirs for the life of A., and B. dies seised, and his heir enters: for he takes only as a special occupant. Co. L. 239. a.

If a man disseises the tenant for life of the king; for he gains nothing but an estate for the life of the lessee. Co. L. 239. a.

So, a descent does not toll an entry, where a man dies seised only of a reversion, or remainder. Lit. s. 388.

So, if a disseisor leases for his own life, and dies; though the fee and freehold descend to his heir, yet he died seised only of the reversion. Co. L. 239. b.

[The doctrine of descent cast does not affect copyhold or customary estates, where the freehold is in the lord. 7 East, 299. 3 Smith, 291.]

(D 3.) If he dies seised of things in grant.

So, a descent of tenements which lie in grant does not take away the entry : as, of an advowson, rent, or common in gross, &c. Co. L. 237. b.

Nor a descent of a copyhold, vide Copyhold, (E)

[*](D 4.) If there be not a dying seised.

So, a descent does not toll entry, if a man does not die seised : as, if a disseisor, or his heir, or feoffee, enters into religion, and is professed ; though it be a civil death. Lit. s. 410.

So, if he does not die seised of the same estate, which the heir has by descent : as, if donee in tail of a disseisor discontinues, and afterwards disseises the discontinuee, and dies seised : for the issue in tail is in his remitter, and is not in of the estate in fee of which his father died seised. Co. L. 238. b.

(D 5.) If no descent, or the descent avoided.

So, an entry shall not be tolled, if there be no descent ; as, if land escheats upon the death of a disseisor or feoffee without issue. Lit. s. 390.

So, if the head of a corporation aggregate dies ; that does not toll entry.

So, if a corporation sole, as a bishop, dean, &c. dies seised, and the land goes to his successor ; that does not toll the entry, though there be twenty successions. Lit. s. 413.

So, if a descent be defeated : as, if an heir, after a descent, enters, and endows his mother : for as to this third part the descent is avoided. Lit. s. 393.

If a disseisor, or his heir, afterwards enters for a condition broken. Lit. s. 409.

So, if the disseisor himself, after a descent comes to the same land by descent or purchase, of an estate of freehold, the right of entry is revived : as, if a disseisor enfeoffs his father, who afterwards dies seised, and the land descends to the disseisor, as his heir. Lit. s. 395.

So, if he enfeoffs his grandfather, and the land descends to his father, and afterwards to the disseisor. Co. L. 238. b.

So, if the father, after the descent, leases to the disseisor for life. Co. L. 238. b.

So, if after a descent, the issue in tail dies without issue, whereby the estate-tail is determined ; the disseisee may enter upon him in reversion or remainder. Co. L. 238. b.

So, if the descent be not immediate : as, if a woman disseissoress takes husband, has issue, and dies, and the husband is tenant by the curtesy, and dies : the descent to the issue does not toll the entry. Lit. s. 394. R. 1 Sal. 241.

If a disseisor dies seised, his wife *privement enseint* ; the descent to the son after-born does not take away the entry. Co. L. 241. b.

(D 6.) If the descent be in time of war.

So, entry shall not be tolled, where the disseisin and descent were in time of war. Lit. s. 412.

Or, if the disseisin was in time of peace, and the dying seised in time of war. Co. L. 249. b.

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(D 7.) Or at the time of the descent, he who had the right was an infant.

So, entry shall not be tolled, where he who had the right was an infant at the time of the descent. Lit. s. 402.

[*]But, an infant shall be bound by a descent from the king. Co. L. 246. a.

So, if he had not a right of entry at the time of the descent: as, if a man dies, his wife *privement enseint*, and B. abates, and dies seised, and then a son is born, he shall be bound by the descent. Co. L. 245. b.

So, if donee in tail discontinues, and afterwards disseises the discontinuee, and dies seised; the heir of the discontinuee shall be bound, though an infant: for, by the descent to the heir of the disseisor, he was remitted. Co. L. 246. a.

(D 8.) Feme covert.

So, where a feme covert is disseised by A., who dies seised during the coverture; her entry is not tolled after the death of her husband. Lit. s. 403.

So, if she was an infant when disseised, and marries; though the disseisin was before the coverture. Co. L. 246. b.

But, if a woman of full age be disseised, and afterwards takes husband; a descent during the coverture tolls her entry: for it was her folly that she did not enter before marriage, and that she took a husband who did not enter. Co. L. 246. a.

So, if a feme covert be disseised, and her husband dies, and before a descent she takes another husband. R. 1 Sal. 241.

So, a descent during the coverture bars the entry of the husband, where the wife, after his death, may enter. Lit. s. 403.

(D 9.) Non-sane, &c.

So, where a man was non-sane at the time of the descent, though his entry is tolled, because he cannot disable himself, yet the entry of his heir is not tolled. Lit. s. 405.

(D 10.) Descent does not take away a title of entry.

So, a descent does not toll a title of entry; for there is no remedy for it by action: as, if a feoffment be upon condition, and the condition is broken, and afterwards the feoffee dies seised, and there be a descent to his heir; the entry of the feoffor for the condition broken is not tolled. Lit. s. 391.

So, though there was descent before the condition broken. Co. L. 240. a.

Though the feoffee was disseised, and the disseisor died seised, and the land descended to his heir. Lit. s. 392.

So, a descent does not toll a title to enter for an alienation in mortmain. Co. L. 240. b.

Or, *causa matrimonii prelocuti*. Co. L. 240. b.

Nor, a title to enter, upon consent to a ravisher. Co. L. 240. b.

So, a descent does not toll the title of a devisee, who claims by the will of him who died seised. Co. L. 240. b.

So, if the younger son enters by abatement after the death of his father, and dies seised; the descent does not toll the entry of the elder son, who

claims by the same title ; for it shall be intended that the younger claimed as heir. Lit. s. 396.

Though the younger son be but of the half blood. Co. L. 242. b.

So, if the younger son enters by intrusion. Co. L. 243. a.

Otherwise, if the younger son enters upon the elder, and disseises him. Lit. s. 397.

[*]Or, enters without colour of title : as, if a gift be to husband and wife and the heirs of their bodies, who have issue a daughter, and the wife dies, and the husband takes another wife, has issue several sons, and the eldest son enters by abatement, and dies seised ; the descent tolls the entry of the daughter : for she claims by a different title. Co. L. 242. b.

So, if the eldest son enters by abatement, where the land is of the nature of borough-english. Co. L. 243. a.

Or, if the younger son enters by abatement, where his father had made a lease for years : for the possession of the lessee is the possession of the eldest son. Co. L. 243. a.

If one parcener enters specially claiming the whole estate, it does not toll the entry of the other parcener. Lit. s. 398.

So, if there be a lessee for years, and the lessor be disseised, and the disseisor die seised ; the descent does not toll the entry of the lessee, though the entry of the lessor be tolled : for the lessee had only a term. Lit. s. 411.

Nor, the entry of tenant by statute, or *elegit*. Co. L. 249. a.

So, by the st. 32 H. 8. 33. the dying seised and descent of a disseisor, not having a right, shall not take away the entry of him that hath right unless the person so dying seised was in possession five years after the disseisin, without entry or claim of him that hath right.

Though the disseisin be not with force. Co. L. 238. a.

So, if a corporation sole be disseised ; the entry of the successor is not taken away, if the disseisor was not in possession five years before the dying seised. Co. L. 238. a.

So, if lessee for life be disseised, and dies, and afterwards the disseisor dies seised within five years ; the entry of him in reversion or remainder is not tolled, though the disseisin be not immediate to him. Co. L. 238. a.

But this st. does not extend to an abator, or intruder. Co. L. 238. a.

Nor, to a feoffee of a disseisor. Co. L. 238. a.

So, if lessee for life be disseised by A. who dies seised within five years, and afterwards the lessee dies without entry ; he in reversion or remainder cannot enter : for he had no right at the time of the descent. Semb. Co. L. 238. a.

[In the case of freehold of inheritance, if the heir at law, before the estate comes to him, confesses a judgment, which is properly docketed, and the estate afterwards descends upon him, the estate is bound in equity. 3 T. R. 365.]

[If the surrender of a copyhold be not good, that is, if no estate thereby passes in the hands of the lord, the surrender will be no estoppel against the heir ; as where an heir apparent surrenders in the lifetime of his ancestor, though he survives him. 3 T. R. 365.]

When a descent shall be avoided by continual claim, vide Claim, (A 1, &c.)

When a descent from a bastard *eigne* binds the *mulier puisne*, vide Bastard, (F).

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For more of title Discent, vide Assets (A—B.)—Parceners, (A 7.)—Remitter, (A 1, &c.)—Roy, (A 1, 2.)

[*]DISCHARGE.

Vide PARLIAMENT, (L 46.)—PLEADER, (2 G. 13. 16.—3 M 12, &c.)
RELEASE.—TEMPS, (G 11, 12.)

DISCLAIMER.

(A) WHEN A MAN MAY TAKE IT.

In a real action, the tenant may disclaim to have any estate in the lands demanded. Vide abatement, (F 15.)—Droit, (F).—Vide Co. L. 102.

(B) THE EFFECT OF A DISCLAIMER.

If the lord disclaims, his seigniorship is extinct, and the tenant shall hold of the lord paramount by the same services. Lit. s. 146.

If the tenant disclaims, the lord shall have a writ of right upon his disclaimer for recovery of the land. Vide Droit, (F).

(C) WHEN A MAN CANNOT DISCLAIM.

But he who cannot part with the whole estate in the land, cannot disclaim; as, tenant, for life, or years.

Nor, a person seised solely in *autre droit*: as, an husband seised in right of his wife.

Or, an abbot, bishop, dean, archdeacon, prebendary, &c. seised in right of his convent, church, &c. Vide Lit. s. 146. Co. L. 102. b. 103. a.

Vide Abatement, (F 15.)—Droit, (F).

DISCONTINUANCE.

(A) DISCONTINUANCE, BY WHOM IT MAY BE MADE.

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(C 1.) If the estate be not divested.—As by a release, &c. without warranty. p. 436.

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(A) DISCONTINUANCE, BY WHOM IT MAY BE MADE.

(A 1.) By a corporation sole.

As to discontinuance in pleading, and process, vide Amendment, (I).—Courts, (P 11.)—Pleader, (V 1.—W 1.)

A discontinuance of an estate in lands and tenements is, when by the alienation of tenant in tail, or any seised in *autre droit*, the issue, heir, successor, or reversioner cannot enter, but shall be put to his action. Co. L. 325.

As, by the common law, if a corporation sole, seised in *autre droit*, had aliened without the assent of the convent or chapter; this was a discontinuance, and his successor could not enter without action. Co. L. 325. b.

As, if an abbot, &c. seised in right of his house, had aliened in fee, in tail, or for life, without the assent of the convent: his successor could not enter without a writ of entry *sine assensu capituli*. Lit. s. 593.

Or, a bishop, without the assent of the dean and chapter. Co. L. 325. b. Lit. s. 651.

Or, a dean, who is sole seised of land in right of his deanery. Lit. s. 652.

Or, a master of an hospital, sole seised in right of his house, if he aliens without the assent of his brethren. Lit. s. 657.

But if an abbot, bishop, &c. had aliened by the common law with the assent of the convent, dean and chapter, &c. it was not a discontinuance. Co. L. 325. b.

[*]So, if a corporation aggregate, as dean and chapter, mayor and commonalty, master and fellows, &c. had aliened, it was not a discontinuance: for the alienation by the whole corporation was lawful; by the head only was a disseisin. Co. L. 325. b. Lit. s. 652. 654. 656.

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So, since st. 1 El. 19. if a bishop makes a lease not warranted by the statute; it is not a discontinuance: for the lease is void. 1 Rol. 633. l. 30.

So, if a parson had aliened, &c. without the assent of the patron and ordinary; his successor might have entered. Lit. s. 643.

Or, a vicar. Lit. s. 644.

So, a release, or confirmation, with warranty, by an abbot, bishop, &c. did not make a discontinuance: for his warranty expired by his death, privation, &c. Lit. s. 604.

Nor, a grant of a reversion, rent common, or thing which lies in grant. Lit. s. 627, 628.

But now, by the st. 1 El. 19. 13 El. 10. and 1 J. 3. bishops and all other ecclesiastical persons are disabled to alien or discontinue any of their ecclesiastical livings. Co. L. 325. b.

(A 2.) How relieved.

The remedy for the successor upon a discontinuance, shall be by a writ of entry *sine assensu capituli*. F. N. B. 194. l.

And it lies in the *per, cui, and post*. F. N. B. 194.

(A 3.) By an husband seised in right of his wife.

So, by the common law, if an husband seised in right of his wife had aliened in fee, tail, or for life; this made a discontinuance to the wife and her heirs, who could not enter after the death of her husband, but were put to their action, by a writ of *cui in vita*, or *sur cui in vita*. Lit. s. 594.

So, if husband and wife had joined in a lease for life, by deed, rendering rent. Co. L. 333. a.

So, if husband and wife were jointly seised in fee, or in tail, and the husband alone had made a feoffment; it was a discontinuance to the heir of the wife. R. 8 Co. 71. b. 1 Rol. 634. l. 10.

But a release by an husband, with warranty, to a disseisor of land, of which he was seised in right of his wife, was not a discontinuance: for the warranty does not descend upon the wife, unless where she is heir to her husband. Lit. s. 605.

Nor, a bargain and sale by deed indented and inrolled. Per Brown, Mo. 28.

So, if a woman tenant in tail takes husband, who aliens in fee; it is not a discontinuance, for he was not seised of the estate-tail. Semb. 1 Rol. 634. l. 15.

And now, by the st. 32 H. 8. 28. a feoffment or other act of the husband, of the inheritance or freehold of his wife, shall be no discontinuance, nor prejudice the entry of the wife, her heirs, or any claiming after her death. Vide Baron and Feme, (K).

Yet, it shall be a discontinuance till avoided by the entry of the wife; and if the wife before entry levies a fine, that affirms the estate of the feoffee. R. per three J. 2 Rol. 312.

[*](A 4.) By tenant in tail.—Alienation of what tenant makes a discontinuance.

So, now, if tenant in tail, by feoffment, &c. aliens in fee, in tail, or for the life of another, and dies; his issue, or, if he dies without issue, he in reversion or remainder cannot enter, but is put to his *formedon*. Lit. s. 595, 6, 7.

So, if husband and wife seised to them and the heirs of their two bodies,

and the husband alone makes a feoffment, &c. and dies after his wife: for the issue claims as heir of both bodies. Co. L. 326. b. Vide Baron and Feme, (I 2.)

If tenant in tail leases for years, and afterwards makes a feoffment, and letter of attorney to make livery, who ousts the lessee, and makes livery; it will be a discontinuance. R. Mo. 91. 281. 1 Rol. 634. l. 35. Vide post, (B).

So, if tenant in tail, remainder to himself in fee, makes a feoffment; it shall be a discontinuance, though the fee was in him. 1 Rol. 633. l. 7. Cro. Car. 405, 6.

So, if tenant in tail of lands held in *capite* by devise, before *primer seisin* sued, makes a feoffment; it shall be a discontinuance of two parts which pass by the devise: for the feoffment was good for them. R. 2 And. 210.

If tenant in tail makes a lease for life not warranted by the st. 32 H. 8. 28. it will be a discontinuance. 1 Rol. 633. l. 35.

So, if a gift be to husband and wife and the heirs of the body of the husband, who makes a feoffment; it will be a discontinuance; for he was seised of the tail. 1 Rol. 634. l. 20. Lut. 732.

Or, if the husband and wife join in a feoffment or fine. 1 Rol. 634. l. 25.

But a fine, or feoffment by tenant for life to another in fee, does not make a discontinuance; but is a forfeiture.

So, if there be tenant for life, remainder to A. in tail, who disseises the tenant for life, and afterwards makes a feoffment; it is not a discontinuance: for he was not seised of the tail. 1 Rol. 634. l. 30. Vide post, (C 3.)

(A 5.) Of what not, by st. 11 H. 7. 20.—What estate shall be within the statute.

But now, by the st. 11 H. 7. 20. if any woman who hath an estate in dower, for life, or in tail, jointly with her husband, or to herself only, or to her use, in lands, &c. of the inheritance or purchase of her husband, or given to them in tail, or for life, by any ancestor of the husband, or any seised to the use of him or his ancestor, shall sole, or with an after-taken husband, discontinue, alien, &c. such discontinuance, &c. shall be void.

And if the woman, at the time of such discontinuance be sole, she shall be barred of all interest, &c.; and he, to whom the title belongs after her decease, shall immediately enter and enjoy.

If such after-taken husband and wife join in a discontinuance, &c. he to whom the title belongs after the decease, may enter and enjoy during the life of husband; but afterwards the woman may re-enter, &c.

And every estate made for a jointure of a wife is within this statute. Semb. Dy. 148.

[*] If it be to a wife for life, or in tail.

Whether it be in use or possession. Dy. 147. b. Mo. 28.

So, if there be an estate to a wife of the purchase or gift of the husband or his ancestor, it shall be within the st. 11 H. 7. though it be not a jointure strictly within the st. 27 H. 8.; as, if husband and wife hold by copy in fee, and the husband purchases the freehold of the copyhold to him and his wife in tail. R. Cro. El. 24.

Though the gift was by the ancestor of the husband, to them in tail, before the marriage; upon which they married. Semb. 2 Cro. 175.

So, if an ancestor of the husband enfeoffs A. upon condition that he shall give back to the husband and wife in tail; which is done accordingly. Mo. 93.

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So, if the husband himself enfeoffs A. upon the same condition. R. 3 Co. 50. b. Cro. El. 514.

Though the estate made by the feoffee does not pursue all the circumstances of the condition, Cro. El. 514.

So, if an ancestor of the husband makes an estate to A. for 30 years, and afterwards to himself for life, and afterwards to the husband and wife in tail. R. Dy. 148.

Or, to A. for 30 years, and afterwards to three others for their lives, and then to the husband and wife. Dy. 148. Bend, 40.

So, if an husband purchases land, which is conveyed to him and his wife, &c. though he pays for the purchase out of the portion of his wife. Mo, 250.

If a man and woman, joint tenants, intermarry, and afterwards convey their land to themselves in tail, &c. it shall be within the statute for the husband's moiety. Mo. 715. 28, 9.

So, an estate to a wife, by an husband or his ancestor, shall be within the statute, though it does not appear by the deed itself to be given in consideration of marriage; for it may be averred, and found by the jury. R. Dy, 148. Bend. 40.

So, though the deed be in consideration of marriage, and of so much money. R. Mo. 93. R. 2 Cro. 474.

So, though the deed be in consideration of money, and no mention of marriage; for it may be averred to be as well for the one as for the other, for they are not inconsistent. R. Dy. 147, 8,

So, if an husband conveys to A. and afterwards there is a recovery against A. and a settlement to husband and wife in tail, &c.; it shall be within the statute, for the whole makes but one conveyance. Mo. 718.

So, if an husband settles land to the wife for life, &c. and afterwards the husband and wife levy a fine, make a mortgage, and limit the remainder to the heirs of the body of the wife; it shall be within the st. 11 H. 7. though by a subsequent conveyance. Semb. 2 Ver. 489.

So, if a trust or equity of redemption be settled upon a wife and the heirs of her body, it shall be within the statute. 2 Ver. 489.

(A 6.) What not.

But if land be given to husband and wife and their heirs in fee, and the wife survives, an alienation by her is not within the st. 11 H. 7. 20.: for an estate which may descend to a collateral heir, and is not a provision for the issues of the marriage, was not intended within the statute. Semb. Dy. 248. a. R. Cro. El. 524. Mo. 716.

[*]So, if it be to a wife in tail general, remainder to a stranger in fee, R. 1 Leo. 261. Cro. El. 2.

So, if the inheritance of the wife be settled by fine, &c. to the use of husband and wife in tail; this is not within the st. 11 H. 7. 20. R. Bend. pl. 266. R. Cro. El. 524. Co. L. 366. a. R. Plo. 464.

Though the husband paid the charge of the settlement. Dal. 116.

Though it be by fine *sur grant et render*. R. Plo. 464.

So, if the estate be settled by an ancestor of the wife to the use of the husband and wife in tail, &c. Dal. 116.

Or, if he makes a feoffment to A. upon condition that he shall give back an estate to the husband and wife in tail. Mo. 93.

Though A. be father or ancestor of the husband. Plo. 464. b.

So, if a settlement by an ancestor of the wife be in consideration of marriage, and also of service done by the husband.

Or, in consideration of marriage and money paid by the husband. R. 2 Cro. 624 Jon. 254. R. Cro. Car. 344. Jon. 13.

Though the money be to the value of the land; for the marriage is the principal consideration. R. 2 Cro. 624. Jon. 254.

So, if husband and wife levy a fine of land of the wife, and the conusee grants a rent to them in tail, and the wife after the death of the husband aliens the rent. R. Cro. El. 2.

So, if a man and woman, joint-tenants, intermarry, and settle land to themselves in tail, &c. it is not within the statute for the moiety of the wife; though the joint-estate was by the gift of an ancestor of the husband. R. Mo. 715.

So, if a stranger, for service of the husband, conveys land to husband and wife (who was his cousin) upon their marriage, in tail, &c. Dub. Mo. 683. But afterwards in the same case R. acc. for it was a recompence to the husband, and not a purchase by him, within the intent of the statute. Yel. 101. 2 Cro. 174.

So, if husband and wife exchange lands, it is not a purchase of the husband. Dal. 116.

(A 7.) What alienation shall be within the statute.

Every alienation which makes a discontinuance will be within the st. 11 H. 7. 20. be it by feoffment, fine, or common recovery, though husband and wife are vouchees or tenants in the recovery. Mo. 716.

By release or confirmation with warranty. 3 Co. 51. 59. a.

So, by demise for three lives, though it be not with warranty; for the word warranty in the statute ought to be referred to releases and confirmations. R. 3 Co. 50. b. Cro. El. 514. Mo. 455.

So, if a woman accepts a fine *sur conusance*, and thereby grants and renders to A. for 1000 years. R. 3 Co. 51. b. R. Mo. 250. Cro. El. 514. 2 Leo. 168. 2 And. 57. Godb. 6.

So, if a woman entitled to dower, before assignment, levies a fine, &c. of it. 2 Leo. 168.

If a wife and second husband convey to A. and his heirs, to the use of him and his heirs for the life of the wife only; for the limitation for the life of the wife regards only the use. Per three J. Cro. El. 131.

But by st. 11 H. 7. 20. the said act shall not extend to any recovery, discontinuance, &c. where the heir, next inheritable to such woman, or to whom the inheritance of the same lands belongs next after her death, be assenting thereto, so as such assent is of record or enrolled.

[*] And therefore if a wife and the issue in tail join in a fine, &c. it shall not be within the statute. 3 Co. 60. b.

So, if a woman tenant for life, and husband and wife in right of the wife in remainder in tail, join in a fine. Dub. Dy. 89. b.

So, if the issue alien by fine, recovery, &c. and afterwards the woman releases with warranty, to the alienee; it shall not be within the statute: for it is intended to complete the act of the issue. R. 3 Co. 60.

So, if the woman aliens to the issue himself in fee. Yel. 101.

So, if the husband himself, who made the jointure, and his wife, join in a fine, &c. it is not within the statute. Cont. Co. L. 365. b. R. acc. 2 Cro. 475.

So, if a woman leases for twenty-one years, it is not an alienation within the statute, though not warranted by the st. 32 H. 8. for it is an usual term, Jon. 60.

(A 8.) Who shall take advantage.

If a woman tenant in tail, by the gift of her husband or his ancestor, discontinues contrary to the st. 11 H. 7. 20. his issue inheritable to the entail shall take advantage of the forfeiture by this statute.

If a gift be to husband and wife in tail, remainder to the husband in fee, who has issue, and dies, and the wife makes a discontinuance, and the issue had granted his remainder in fee to A.; yet the issue, and not A., shall enter for the forfeiture. R. 3 Co. 51. a. Mo. 455.

If the issue, who has a remainder expectant in fee, aliens by fine to A., then A. shall enter: for by the fine, his interest in the entail is barred and extinct. R. 3 Co. 51. Cro. El. 514. Mo. 455.

If the issue releases to a disseisor of the wife, to whom the wife afterwards releases with warranty, (which makes a discontinuance,) though the issue cannot enter against his release, yet his issue shall enter. 3 Co. 59. a.

Yet when he who had the interest at the time of the forfeiture, is disabled to take advantage of it, by fine or recovery; his issue, &c. shall never take advantage of it. R. 3 Co. 61. a.

So, if there be a daughter at the time of the forfeiture, and a son is born afterwards; he shall take advantage of the forfeiture, though the daughter had disabled herself by fine, recovery, or other act. 3 Co. 61. b.

So, if the daughter had joined with the wife in the fine, &c. by which she discontinued. 3 Co. 61. b.

So, if the daughter enter for the forfeiture, the son afterwards born shall enter upon her. 3 Co. 61. b.

So, the next in remainder or reversion, if there be no issue, shall take advantage of the forfeiture.

If a woman, tenant for life, joins with a remainder-man for life, in a feoffment, the subsequent remainder-man shall enter. 1 Leo. 262.

But a fine, recovery, feoffment, &c. which makes a discontinuance, shall be void only as against him who has the interest, &c. to enter. R. 3 Co. 59. b. D. Hob. 166.

And when he enters, he shall be in paramount his former estate and shall not be in ward, though within age. R. Dy. 362. 3 Co. 62. a. Yet he shall take in right of the entail, and *quasi* by descent. Hob. 337.

And shall have only for the life of the husband; though husband and wife discontinue by fine. Dub. Dy. 362. a. Acc. 3 Co. 62. a.

[*] So, if a woman with her second husband aliens to the issue, who by fine conveys to B., and after the death of her husband the woman enters and avoids her alienation, and then discontinues; B. shall not take advantage: for a new right did not accrue after the fine. R. Yel. 101. 2 Cro. 175.

(B) WHAT ALIENATION MAKES A DISCONTINUANCE.

A discontinuance by tenant in tail may be made by five manners of conveyance; as, by fine, common recovery, feoffment, release, or confirmation with warranty. Co. L. 325. a.

And therefore, if tenant in tail levies a fine or suffers a common recovery with a single voucher; this makes a discontinuance of the estate-tail, and puts him in reversion or remainder to his action. Vide Co. L. 325. a.

[Whether it is a fine with proclamations, or a fine at common law without proclamations, it puts the reversioner or remainder-man to his *formetion*. H. 32 G. 2. 2 B. M. 704.]

If he suffers a feigned recovery by default. Co. L. 356. a. 361.

If he levies a fine, or recovery in antient demesne. R. Lut. 781.

So, if he makes a feoffment : for in respect of the livery the estate is divested, and the whole fee passes ; by which the issue, and by consequence he in reversion and remainder are put to their action, and cannot enter.

Co. L. 327. b. Dy. 363. a.

Though the feoffment be by parol. Co. L. 330. b.

So, if he makes a lease to A. for life, remainder to B. in fee : for the whole is one estate, and passes by the same livery. Co. L. 333. b.

Or, a lease for years, remainder in fee. Lit. s. 631.

So, if he leases for years, and afterwards makes a feoffment in fee. R. Mo. 91. 281.

Or, levies a fine. Co. L. 332. b. Vide post, (C 3.)

If he leases for life, and afterwards enters upon his lessee, and makes a feoffment, and the lessee re-enters. Mo. 281.

So, if lessee for life surrenders to him, or he recovers or waste, or enters for a forfeiture, and afterwards makes a feoffment, &c. Co. L. 333. b.

So, if tenant in tail makes a lease not warranted by st. 32 H. 8. 28. for the life of another ; it will be a discontinuance. R. 1 Rol. 633. l. 10. 35. 2 Rol. 59. l. 1.

So, if tenant in tail releases with warranty, which descends upon the issue ; it shall be a discontinuance, for the safeguard of the warranty, which would be destroyed if the issue might enter. Lit. s. 601. Co. L. 328. a. b.

So, if tenant in tail leases for life, and afterwards grants the reversion in fee with warranty which descends upon the issue with assets ; it shall be a bar to him, though his right of entry was not taken away. 1 Sal. 245. R. Cro. Car. 156. Jon. 209.

So, if tenant in tail be disseised, and releases to the disseisor, with warranty : for this is tantamount to a feoffment. Mo. 256.

So, if tenant in tail makes a discontinuance for life, &c. whereby he has a new reversion, and he afterwards grants his reversion in fee, which takes effect in his life ; it shall be a discontinuance in fee : for it is a continuance of the first act, which was with livery. Co. L. 333. 1 Sal. 244.

[*]Whether it takes effect by the death, surrender, or forfeiture of the discontinuee for life. Co. L. 333. b.

So, if he releases to the discontinuee for life, and his heirs : for it is executed immediately. Co. L. 333. b.

If he gives to A. in tail, and afterwards releases to him and his heirs ; if A. dies without issue in the life of tenant in tail. Co. L. 333. b.

If he grants the reversion to the use of another in fee, and this takes effect in his life. Co. L. 333. b.

Or, bargains and sells by deed indented and inrolled. Co. L. 333. b.

Vide post, (C 5. 7.)

(C) WHAT NOT.

(C 1.) If the estate be not divested.—As, by a release, &c. without warranty.

But a conveyance which does not operate by transmutation of the estate
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or possession, generally, does not make a discontinuance : for it can only be where the estate is displaced and turned to a right. Co. L. 327. b.

And therefore, if tenant in tail conveys by lease and release to another in fee, in tail, or for life, it shall not be a discontinuance : for nothing passes but that which tenant in tail may lawfully do, viz. for his own life. Lit. s. 606. Vide post, (C 4.)

So, if he leases to another for his own life, or for years, and afterwards confirms the estate of the lessee, for life, or in tail, or fee. Lit. 607. 609. 619.

So, if tenant in tail releases to his disseisor, without warranty, all his right. Lit. s. 598. 600.

(C 2.) Or, if the warranty does not descend upon the issue in tail.

So, a release, &c. with warranty, shall not be a discontinuance, if the warranty does not descend upon the issue in tail : as, if a man has a son by a first wife, and land is given to him and a second wife and the heirs of their bodies ; he is afterwards disseised, and releases to the disseisor, with warranty ; this does not make a discontinuance ; for the warranty shall descend to his son by the first ventre. Lit. s. 602.

Or, if the land be of the nature of borough-english, and he has two sons : for the warranty descends upon the heir at the common law. Lit. s. 603. Vide Garranty, (1 2.)

(C 3.) By a conveyance of that which lies in grant.

So, a grant of tenant in tail does not make a discontinuance : as, if he grants in fee, &c. a reversion after a lease for life, or for years ; for nothing passes except for the life of tenant in tail. Lit. s. 608. 612. 619.

Though the grant be inrolled. Co. L. 330. b.

And if the lessee attorns. Co. L. 330. b.

So, if tenant in tail grants all his estate. Lit. s. 613.

Though livery of seisin be made upon such grant. Lit. s. 613.

So, if tenant in tail in remainder grants his estate in fee, &c. Lit. s. 615.

[*]Or, makes a feoffment of it, with the assent of the tenant for life : for his assent is not a surrender. R. Carth. 110.

So, if he disseises tenant for life, and afterwards makes a feoffment in fee : for he was not seised in tail. 1 Rol. 634. l. 30.

So, if tenant in tail of any thing which lies solely in grant, makes a grant of it in fee, &c. it shall not be a discontinuance : as, if he grants a rent, common, advowson, &c. Lit. s. 616, 617.

So, if tenant in tail of a reversion, remainder, rent, common, or other thing which lies in grant, levies a fine of it in the king's court, it does not make a discontinuance : for nothing passes but for his own life. Lit. s. 618. R. 2 And 110.

If the reversion be after a lease for his own life. Co. L. 332. b.

But if it be after a lease by him for years, it will be a discontinuance : for then the freehold passed by the fine, and all the estates are displaced. Co. L. 332. b. Vide ante, (B).

So, if tenant in tail grants a thing, which lies in grant only, with warranty which descends upon the issue ; it shall not be a discontinuance. Co. L. 332. b.

Though he leaves assets in fee. Co. L. 332. b.

So, if tenant in tail of a rent disseises the terre-tenant, and makes a feoffment with warranty : it shall not be a discontinuance of the rent, though the warranty extends to it. Co. L. 332. b.

But a grant of a reversion by tenant in tail, after a former discontinuance for life, &c. if it takes effect in his life, enlarges and continues the first discontinuance. Co. L. 333. Vide ante, (B).

(C 4.) By a conveyance which has not livery.

So, a conveyance of lands and tenements which operates by the execution of the deed, without other ceremony, shall not be a discontinuance : as, if tenant in tail exchanges land : for it passes by the deed, without livery. Co. L. 332. b.

So, if a man tenant in tail devises his land by his will, it does not make a discontinuance : for it does not take effect in his life time. Lit. s. 624.

If he conveys by lease and release without warranty. Vide ante, (C 1.)

Or, by bargain and sale enrolled. Adm. 1 And. 113. R. 3 Leo. 16.

So, if tenant in tail covenants to stand seised to the use of another in fee. 1 Leo. 110.

So, if tenant in tail in remainder, or such a person as could not make a discontinuance by feoffment, releases to a disseisee, with warranty. R. Mo. 256.

Or, levies a fine, and dies without issue in the life of tenant for life. R. 2 And. 110. R. Latch, 65.

So, if the king tenant in tail grants lands by his letters patent ; it does not make a discontinuance. Co. L. 332. b.

If a copyholder tenant in tail surrenders in fee, &c. it does not make a discontinuance. 1 Rol. 632. l. 25. Vide Copyhold, (E).

So, if an husband seised in right of his wife, of a copyhold, surrenders in fee. R. 4 Co. 23. a. 1 Rol. 632. l. 35. Vide Copyhold, (E).

[A discontinuance is not affected by a secret feoffment under a naked possession. Cowp. 689.]

[*][The grantee has a base fee, determinable on the death of a tenant in tail. 3 Burr. 1703. 7 T. R. 276.]

(C 5.) To him in reversion or remainder, or with him.

So, if tenant in tail conveys to him, who has the immediate remainder or reversion dependent upon the estate-tail ; it does not make a discontinuance. Lit. s. 625, 626. 1 Rol. 633. l. 45.

So, if tenant for life, and he in the remainder in tail, join in a fine ; it shall not be a discontinuance : for each gives that which he lawfully may. R. 1 Co. 76. R. Cro. El. 827. Mo. 634. Ow. 130.

So, if a reversion or remainder be in the king, and tenant in tail makes a feoffment, &c. it shall not be a discontinuance : for the reversion in the king cannot be divested ; and without divesting all estates, there can be no discontinuance. Co. L. 335. a.

So, if there be tenant for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to A. in fee, and husband and wife levy a fine to B. in fee ; this is not a discontinuance to the estate of A., which was not divested by the fine : for the estate tail was not executed in the tenant for life. R. per three J. 1 Lev. 37.

So, if there be a tenant for life, remainder to B. in tail, and they make a lease for three lives ; for it is the lease of the tenant for life, and the confirmation of B. R. Cro. El. 56.

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Tenant for life, remainder to the heir of B. in tail, remainder to C. in tail; if the tenant for life and C. in the life of B. levy a fine, it will not be a discontinuance: for by fine or feoffment before the contingency, the contingent remainder is prevented. 2 Sand. 386.

But if tenant in tail conveys to him in reversion and a stranger, it shall be a discontinuance of the whole. Co. L. 335. a.—If he who is the stranger survives, otherwise not. Cro. Car. 406.

Or, to him in reversion, when there is a mense remainder in tail, or for life. Co. L. 335. a. 1 Rol. 634. l. 2.

So, if tenant in tail, remainder to B. in tail, remainder to C. in tail, &c. joins with C. in a feoffment and fine; it will be a discontinuance: for there is a mense remainder in B. R. Cro. Car. 321. Jon. 324. 1 Rol. 632. l. 50.

So, if tenant in tail and he in reversion join in a lease not warranted by st. 32 H. 8. 28. it shall be a discontinuance, though the tenant in tail dies without issue before the lease determines. R. per. three J. Croke cont. Cro. Car. 387. 405. 1 Rol. 633. l. 10. Jon. 359. Hut. 126.

(C 6.) If the discontinuor be an infant.

So, if tenant in tail within age makes a feoffment, &c. it shall not be a discontinuance: for he may avoid it by his entry; and that which he himself shall avoid shall not hurt others; and therefore, if he dies, the issue in tail may enter. Lit. s. 633. 635.

So, if joint-tenants within age make a feoffment the survivor shall enter into the whole. Lit. s. 634.

(C 7.) Or was never seised by force of the entail.

So, there shall not be a discontinuance by him who was never seised by force of the entail: as, if the grandfather be disseised by the father, [*]who makes a feoffment, and dies; the feoffment never shall be a discontinuance, because the feoffor was not seised of the entail. Lit. s. 637.

Though the father survives the grandfather; for though he himself cannot enter against his own feoffment, his issue may. Co. L. 339. a.

So, if tenant in tail discontinues for life, and dies, his issue grants the reversion in fee, which takes effect in his lifetime; this shall not be a discontinuance; for he was not before seised by force of the entail. Lit. s. 638.

Though the grant of the reversion was with warranty. Co. L. 339. b.

So, if the issue inheritable to an entail makes a feoffment in the life of his ancestor, it shall not be a discontinuance. Lit. s. 640, 641.

If he in remainder in tail after an estate for life, disseises the tenant for life, and makes a feoffment; Lit. s. 658. for though the remainder was vested in him, yet he was not seised in tail. Co. L. 347. b. [Vide Cowp. 702.]

If tenant for life, remainder to B. in tail, join in a fine to C. in fee. R. Cro. El. 827, 8.

If a woman, tenant for life, intermarries with him in remainder in tail, and husband and wife join in a fine. R. Mo. 634. Cro. El. 827.

So, if the eldest son inheritable by the entail enfeoffs A., against whom a recovery is had, in which the feoffor was vouched, and then dies, in the life of tenant in tail, without issue; it shall not be a discontinuance to the younger son. R. 1 And. 44.

But there is no need that the person be seised by force of the entail at
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the time of the discontinuance, if he ever was seised by force of it. Co. El. 339.

So, a feoffment with warranty by issue inheritable to the entail, though he was never seised of it, may have the effect of a discontinuance. Co. L. 339. a.

So, a fine by him in remainder in tail after a term for years, during the term, shall be a discontinuance, though he is not tenant in tail in possession. Per Coke, 1 Rol. 188.

So, if there be tenant in tail after an estate to A. for life, and A. makes a feoffment to the use of himself for life, remainder to the tenant in tail in fee, and afterwards A. and the tenant in tail enter, and make livery to B., it will be a discontinuance: for by the entry of the tenant in tail, (which shall be adjudged an entry for the forfeiture,) he was seised in tail, and then a feoffment by him and A. to B. made a discontinuance. Per two J. Clench. cont. 1 Leo. 127. Cro. El. 135.

So, if an estate be given to husband and wife and the heirs of the body of the husband, and they join in a feoffment and fine; it will be a discontinuance; though the wife had a joint estate for life with the husband, and therefore he had not an absolute seisin of the estate tail. R. per three J. Jones cont. Cro. Car. 321. Jon. 323. 1 Rol. 632. l. 47.

[Actual seisin by force of the entail is essential to discontinuance. 1 H. B. 269. 2 Burr. 1065.]

(C 8.) If the discontinuance was not executed in his lifetime.

So, if the act, by which the discontinuance is made, does not take effect in the life of the tenant in tail, there shall be no discontinuance.

As, if a fine be levied by which the tenant in tail grants and renders his land to B. in fee; it shall not be a discontinuance if the tenant in tail dies before execution. Co. L. 333. b. 1 Rol. 632. l. 45.

[*]So, if tenant in tail discontinues for life or in tail, and afterwards grants the reversion in fee; the grant does not make or enlarge the former discontinuance, if it does not take effect in his lifetime. Lit. s. 622.

Though the grant be with warranty. Co. L. 333. b.

So, if he discontinues for life by fine with warranty, and afterwards levies another fine with warranty to himself and his heirs; the last fine did not make another discontinuance: for the use being to himself, the warranty was extinct. R. 1 Sal. 244.

So, if the last fine was to A. and his heirs, it would not be a discontinuance, if the first discontinuee for life did not die before the tenant in tail. R. 1 Sal. 244.

If A., tenant in tail, enfeoffs B., who re-enfeoffs A., C., and D., to the use of A. for life, remainder to his son in fee, and a recovery is had against A. who dies, and C. and D. enter; the discontinuance ceases with the life of A. R. 1 And. 44.

So, if the grantee of a reversion grants it to B., and then the discontinuee for life dies in the lifetime of the tenant in tail, and B. enters; it shall not be a discontinuance, because B. does not take by the grant of tenant in tail himself. Co. L. 333. b.

Or, if the grantee dies without heir, by which the reversion escheats, and then the discontinuee for life dies, and the lord enters. Lit. s. 642.

So, if it be not executed by lawful means; as, if tenant in tail disseises a discontinuee for life, and makes a feoffment, and then the discontinuee dies, in his lifetime; the feoffment shall not be a discontinuance. Co. L. 333. b.

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(C 9.) If his act was lawful.

So, a common recovery, by tenant in tail, as vouchee, is not a discontinuance, but a bar to the entail, and all remainders and the reversion. Vide Estates, (B 27, &c.)

So, a fine by tenant in tail is a bar to his issue, and a discontinuance only to those in remainder or reversion. Vide Estates, (B 25.)

So now, by the st. 32 H. 8. 28. a lease for three lives pursuant to the same statute does not make a discontinuance. Co. L. 333. a. Per two J. 1 Leo. 299. R. Cro. El. 602. Sav. 77. Per three J. 4 Leo. 191.

So, if tenant in tail leases for 100 years or more ; it does not make a discontinuance : for the lease determines by his death. Lit. s. 622.

So, partition made by parceners in tail does not make a discontinuance. Lit. s. 602.

So, if tenant for life or for years makes a feoffment, &c. it shall not be a discontinuance, but a disseisin. (Qu. Forfeiture?)

Yet a recovery against tenant for life, by default, upon a false title, makes a discontinuance to the reversion or remainder. Lit. s. 674. 688.

(D) THE EFFECTS OF A DISCONTINUANCE.

Every discontinuance divests the estate-tail, and all remainders, and the reversion depending upon it. Co. L. 327. b.

But if husband and wife join in a lease for life of the land of the wife, rendering rent, the reversion was not out of the wife. Co. L. 333. a.

So, by a discontinuance for life or in tail, the tenant in tail gains a new and tortious reversion in fee to himself ; for being divested out of [*]the donor, &c. and not granted to the discontinuee, it remains in the discontinuor. Lit. s. 620.

And this reversion descends to the heir general, not to the heir in tail. Lit. s. 623.

But if the discontinuance determines in the life of the tenant in tail ; the tortious reversion vanishes, and he shall be tenant in tail as before. Co. L. 333. a.

[Tenant in tail, by suffering a recovery, takes the fee either by purchase or descent, as he took the estate tail. 5 T. R. 104. 107. n.]

[And by a fine a base fee is created, which merges in the other fee, and so lets in the ancestor's incumbrances. 5 T. R. 104.]

(E) WHEN IT SHALL BE DETERMINED.

If the estate of the discontinuee determines, or is defeated, the discontinuance is purged : as, if a discontinuee for life dies, or in tail, dies without issue, in the life of the tenant in tail. Vide Co. L. 333. a.

If the discontinuance be for three lives, which die. R. Lut. 781.

So, if the estate of the discontinuee be forfeited or surrendered. Lit. s. 636.

Or, defeated by entry for a condition broken. Lit. s. 632.

If the discontinuee re-enscoffs the discontinuor. 3 Leo. 10.

But if there be a discontinuance with warranty, and the discontinuee makes a lease, and afterwards conveys to the discontinuor, who dies ; his heir shall not avoid the lease, though the warranty be determined by the re-conveyance. 3 Leo. 10.

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(A) TITHES, THE NATURE OF THEM.

Tithes are an ecclesiastical inheritance, collateral to the land, and properly due to an ecclesiastical person. D. 11 Co. 13. b.

And because they are collateral they cannot be extinguished by unity of possession; as, if a parson, &c. be seised of lands in right of his church, if he afterwards aliens them, tithes are payable. Mo. 50. Vide post, (D).

If a manor or lands belonged to an abbot, prior, &c. to whom a church was appropriate; after the dissolution, the tithes of the lands copyholds of the manor should be paid to the parson. R. Mo. 50. 219.

So, they are not extinguished, if the parson releases to his parishioner all demands in his land. Ow. 39, 40.

So, they cannot be granted by copy; for they are not parcel of the demesnes of the manor. Dub. Cro. El. 814. 293. R. contra, Cro. El. 413. Per Rol. 1 Rol. 498. l. 10. Mo. 355. Vide Copyhold, (C 1.)

[*]So, they are an incorporeal inheritance; and therefore do not pass by grant without deed.

And a rent cannot be issuing out of them. Co. L. 47. a.

(B) OTHER ECCLESIASTICAL REVENUE.

(B 1.) Oblations, &c.

Other ecclesiastical revenues were oblations, or obventions, pensions, and mortuaries. Vide Prohibition, (G 11.)

Oblations are, *quæcunque a piis offeruntur Deo & ecclesiæ*. 2 Inst. 489.

And they are voluntary, or due by custom at a certain time; as, upon marriage, baptism, purification of women, funerals, &c. Vide 2 Inst. 659.

And by can. S. Mepham. arch. Cant. made anno 1328, those *qui in nubentium solenniis, purificationibus, exequiis, &c. ad unius denar. vel. al. modicæ quantitat. oblationem populi devotionem sunt moliti restringere, &c.* shall be subject to the pain of excommunication. Vide Lind. 185. Vide Cod. Ju. Eccl. 739.

And by Can. Othoboni, anno 1268, *capellani &c. universas oblationes, &c. rectori ecclesiæ matricis restituere debent*, under pain of suspension. Vide Co. Ju. Eccl. 235.

And now, by st. 2 & 3 Ed. 6. 13. all who by the laws and custom of the realm ought to pay offerings, shall yearly pay them to the parson, &c. or

farmer of the parish where he dwells, at the four most usual offering-days, or otherwise at Easter.

By this statute all customary oblations to be paid at communion, marriages, &c. ought to be paid.

[Per tot. Cur.—Easter offerings are due of common right at 2*d.* per head, unless customary to pay more, to him who exercises the spiritual function. T. 10 G. Bunb. 173. T. 1725, Bunb. 198. A mortuary cannot be sued for in equity, but at common law, or in the spiritual court. M. 13 G. Str. 715.]

[A poor vicarage may be entitled to an augmentation under stat. 29 C. c. 8. though the reservation is not made to it; and a constant regular payment is evidence thereof. H. 1747, 1 Vesey, 91.]

As to tenths, first fruits, synodals, procurations, &c. vide Tenths.—Prohibition, (G 11.)

(B 2.) Glebe.

Every church of common right ought to have a manse and glebe. Vide Ecclesiastical Persons, (C 9.)

Gleba, est terra in qua consistit dos ecclesiæ. Lind. 254.

By Can. 1603. 87. archbishops and bishops shall procure terriers of all glebe, &c. which belong to any parsonage, vicarage, or rural prebend, to be taken by honest men of every parish (of whom the minister to be one) to be laid up in their registers. Vide Cod. Ju. Eccl. 688.

(C) TO WHOM DUE.

(C 1.) To the rector.

All tithes, renewing within a parish, regularly ought to be paid to the rector of the same parish. Hob. 296.

[*]And this since the council of Lateran, without question, A° 1215. Seld. H. of T. 3 vol. 1150. 1222. 1258.

If there be rector and vicar endowed, all tithes belong to the rector, which the vicar does not claim by endowment or prescription. R. 2 Bul. 27.

[A perpetual curate of a chapel, though appointed expressly for life, being removable at common law without cause, and by ecclesiastical law for cause, has not such a permanent interest as to claim tithes. M. 1729, Bunb. 273.]

A rector by an illegal presentation, being inducted, shall have tithes. Hob. 302.

But before the council of Lateran A° 1215, every one might give his tithes to what spiritual person he pleased. 2 Inst. 641. 2 Co. 44. b. But this was restrained, not by a canon of that council, but by a decretal epistle of pope Innocent 3*d.* Cod. Ju. Eccl. 690. [Vide 2 Wils. 182.]

So, if cattle depasture in a fenn, &c. which is extraparochial, tithes of the pasturage are payable to the rector of the parish where the owner inhabits, if there be not a custom for payment to another. Sav. 60.

So, by st. 2 & 3 Ed. 6. 13. if it is not known in what parish the waste or common, where the cattle depasture, lies.

(C 2.) To another spiritual person.

But by custom, a portion of tithes in one parish, may be due to the rector of another parish. 4 Co. 35.

So, if the vicar be endowed with tithes of hay, or small tithes, they ought to be paid to him.

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If the vicar be endowed with tithes of hay, and the land be sowed with clover; the vicar shall have the tithes of the clover. R. (*ut dicitur*) Carth. 264. Skin. 341.

If a parson has tithes of all grain, he shall have the tithes of seed of clover, though the vicar has the tithes of the clover grass. Skin. 341.

But a parish clerk cannot prescribe to have tithes. R. Mo. 908.

(C 3.) To the king.

Extraparochial tithes are due to the king. 1 R. 657. l. 15. 20. 30. 35. Sti. 137. Cod. Ju. Eccl. 691.

[The tithes of assart lands, by virtue of the words *de novo assartatis et assartandis* in the grant of Ed. 1. should be confined to such lands as were then assarted, or intended shortly so to be; and not extended to such as should be so in future ages, especially if they had never paid tithes. Semb. per Comyns. H. 1731, Bunb. 312.]

And if the king grants them, his patentee shall have them. 1 Rol. 657. l. 15. Vide post, (C 5.)

But, by custom, they may be paid to the parson, vicar, &c. of such a parish. Sav. 60.

So, now, by st. 2 & 3 E. 6. 13. the tithes of cattle depasturing in a waste or common extraparochial, or, if the parish is unknown, are given to the parson, &c. of the parish where the owner dwells. 2 Inst. 651.

[*](C 4.) To the lord of the manor.

By the common law no one was capable to take tithes in pernaney, but a spiritual person, or the king, who is *persona mixta*. R. 2 Co. 44, 45.

Or, the patentee of the king, by his prerogative. 2 Co. 44. a.

Yet, by indirect means, a layman might take them; as, a lord of a manor may prescribe, in consideration that he has paid so much to the rector for all tithes within his manor, to take all tithes within his manor. R. 2 Co. 45. Cro. El. 299 R. Cro. El. 763. Mo. 485.

And he ought to prescribe to have *decimam garbam*, or *decimum cumulum granorum*; not *pro decimis garbarum*: for they are not tithes properly, but a profit apprender. R. Cro. El. 599.

(C 5.) To a patentee.

So now, by st. 27 H. 8. 28. patentees of all manors, lands, tenements, tithes, pensions, churches, portions, &c. or other hereditaments of abbeys, &c. dissolved heretofore or by this act, shall enjoy the same according to the effect of such letters patents; and shall have the same remedies, &c. as the abbots, &c. could have had.

So, patentees of lands, tithes, &c. given to the king by st. 31 H. 8. 13. 37 H. 8. 4. or 1 Ed. 6. 14. which by construction of those statutes and the st. 32 H. 8. 7. and 1 & 2 Ph. & M. 8. are become temporal inheritances. Co. L. 159. a.

And by st. 32 H. 8. 7. and 1 & 2 Ph. & M. 8. those patentees shall have the same remedy for recovery, &c. and the same means for assurance of such tithes, &c. as for other temporal inheritances. Vide post, (M 18.—N).

And may sue in the ecclesiastical court for withholding such tithes, &c. Vide post, (M 2. 3.)

So by st. 2 & 3 Ed. 6. 13. they may recover the double value if predial tithes be not set out, &c. Vide post, (M 2.)

[If a patentee claims the tithes of a manor, &c. formerly belonging to an abbot, who was seised thereof as of a portion of tithes in gross, and his evidence mentions only *omnes vel omnimodas decimas*, &c. without mentioning a portion, it is sufficient to support it. H. 1724. Bunb. 189.]

Vide ante, (C 3, 4.)

(D) BY WHOM PAYABLE.

- All persons generally ought to pay their tithes to whom they are due.

And therefore, of common right all lands ought to pay tithes. 11 Co. 15. a.

Though held in *capite*. Mo. 915.

The tithes shall be paid by the occupier of the same lands.

If the owner occupies them, he shall pay.

If he leases them for a year, or at will, &c. the lessee shall pay.

If the owner or lessee sells the crop of grass or corn, and the vendee cuts it, he shall pay the tithes. 2 Bul. 184.

So, if the owner of wood sells to another, who cuts it; he shall pay.

If the owner of the land sells the crop, and then purchases the rectory, the vendee shall pay tithes to him. R. 2 Bul. 184.

[*]If the occupier be a disseisor, &c. and sets out his tithes, the parson may take them; for it is not material whether he has the possession by right, or by wrong. R. Jon. 89, 90.

But if the owner consumes his herbage by agistment of the cattle of another, the owner of the cattle does not pay the tithes. 1 Jon. 254. 1 Rol. 636. l. 15.

If a parson, &c. at common law, had enfeoffed another of his glebe, the feoffee paid tithes; for tithes are not extinguished or suspended by unity of possession. 11 Co. 13. b. Dy. 43. a. Vide ante, (A.)

So now, if a parson leases his glebe, the lessee shall pay tithes. Dub. Dy. 43. a. Per Fenner, 1 Rol. 655. l. 42.

Though he leases it with all profits belonging, rendering rent for all demands to the same rectory belonging. R. 11 Co. 13. b. Cro. El. 161. Cont. per two J. Mo. 47. Acc. Dy. 43. a. in marg. Ow. 39. 1 Leo. 300.

So, if a parson sells the emblements of his glebe, the vendee shall pay tithes. 1 Rol. 655. l. 45.

If a vicar sows his glebe, and dies before severance, his executor shall pay. Dub. Hob. 188.

If a parson leases his rectory, he shall pay tithes to his lessee for his other lands in the same parish. 11 Co. 14. a. R. Dy. 43. a. Mo. 532.

If he leases his rectory, reserving the tithes of his own land, and afterwards grants this land; the grantee shall pay tithes. Semb. Dy. 43. a. in marg.

But if a parson lets his glebe rendering rent for tithes after growing, as well as for other demands; the lessee shall not pay tithes to him. Semb. Cro. El. 161.

(E) BY WHOM NOT.

(E 1.) Not *per ecclesiam ecclesiæ*.

One spiritual person, generally, does not pay tithes to another: as, if a vicar be endowed of glebe and small tithes; he shall not pay tithes of his glebe to the parson. R. Cro. El. 479. 579. Sav. 3.

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So, a parson shall not pay tithes to the vicar, for his glebe. Mo. 457.

So, if a vicar be endowed of small tithes, generally, the parson shall not pay small tithes to the vicar. R. Cro. El. 578. Mo. 910.

Though the endowment be of the small tithes of the whole parish. R. Cro. El. 578. Mo. 910.

So, a patentee of a parsonage shall not pay: for the parsonage being discharged at the time of the endowment, and afterwards at the dissolution, the patentee shall have it discharged. R. Cro. El. 578.

So, if land be severed from the glebe after endowment, it shall not pay tithes to the vicar. R. 2 Rol. 335. l. 10.

But the lessee of the parson shall pay small tithes to the vicar. R. Cro. El. 479. 578. Mo. 910. Sav. 3.

So, the parson himself shall pay, if the endowment was of tithes of the glebe expressly, as it might be. Cro. El. 578. Mo. 910.

Or, the land comes to the parsonage after the endowment. Vide Mo. 910.

Or, if the parson has lands not parcel of the rectory. 11 Co. 14. a. Vide Ante, (D).

[*](E 2.) By those who prescribes *in non decimando*.—Who may prescribe.—Spiritual persons.

So, a spiritual person may prescribe *in non decimando*. 2 Co. 44. b. 1 Rol. 653. l. 10. Cro. El. 475. 1 Leo. 248.

And therefore, a bishop may prescribe, that he and all his predecessors, seised of such a manor in right of his bishopric, have held the manor by them and their tenants, discharged of tithes. R. 2 Co. 44, 5. 1 Rol. 653. l. 15. Cro. El. 216. 1 Leo. 248. Mo. 425.

And his tenant of the manor, by such prescription, may be also discharged: for the demise does not make the land chargeable, which was discharged before. R. 2 Co. 45. a. 1 Rol. 653. l. 25. Cro. El. 475. 511. Mo. 619.

So, the copyholders of the manor may allege a prescription in the bishop for their discharge. R. 1 Rol. 653. l. 40. Cro. El. 784. Mo. 618. Yel. 2.

So, a parson, having glebe in another parish, may prescribe *in non decimando*, for him, his farmers, and tenants. R. 1 Rol. 653. l. 30. Mo. 531.

So, an abbot, or other ecclesiastical body, might prescribe *in non decimando*. Vide Mo. 531.

So, if a manor, land, &c. of a bishop, parson, &c. be granted to another in fee, and afterwards regranted to the bishop and his successors; the prescription is not destroyed. R. 1 Leo. 248. Cro. El. 216.

(E 3.) The king.

So, the king may prescribe *in non decimando*: for he is *persona mixta*. R. Jon. 387. R. Hard. 315. Mo. 486.

As, for tithes of the lands of a forest, though they are within a parish. Sti. 137. R. Ca. Eq. 230.

Though the land be demised at the king's will. Mo. 915.

But the king's patentee shall not have the same privilege. R. Jon. 387. Cro. Car. 94. 1 Rol. 655. l. 25. Hard. 315.

So, without a particular prescription, the king shall not be discharged of
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tithes for the antient demesnes of the crown. R. Hard. 315. Semb. Sti. 137.

So, when discharged by prescription, if he aliens the land, the prescription is destroyed: and therefore, if afterwards the same land, by escheat. &c. comes back to the crown, it shall not be discharged of tithes. R. Hard. 315.

So, a lessee for life or years of the king, shall not have the same privilege. Mo. 915. Qu. If this does not relate to monastery land? Vide post, (E 7.) R. that a lessee for years of the king, rendering rent, shall have privilege, if the king prescribes for him and his tenants to be discharged. Per Cur. Exch. M. 6 Geo. 2.

(E 4.) A county, &c.

So, a county may prescribe *in non decimando*. 1 Rol. 653. l. 50.

So, a county, as the Weld of Kent, or Sussex, may prescribe in non-payment of tithes of wood. 1 Rol. 653. l. 52, 654. l. 5. 2 Rol. 122. Pal. 37. 2 Inst. 645. 653.

So, an hundred. Semb. 1 Rol. 654. l. 30. Mar. 25. pl. 59.

[*]So, a man may prescribe, that by the custom of the country where he lives, no tithes are paid for the milk of ewes. R. 1 Rol. 654. l. 15.

That by custom a baker does not pay tithes for grain which he grinds in his mill for his trade, whereby the parson has more ample tithes: for this is but a personal tithe. R. 1 Rol. 654. l. 20. 4 Mod. 337.

But a parish cannot prescribe *in non decimando*. 1 Rol. 653. l. 47. 2 Inst. 645. Mar. 25. pl. 59.

So, a custom *de non decimando* cannot be alleged in an hundred or county, for things which of common right ought to pay tithes: as, for agistment of cattle. R. 4 Mod. 344. Sal. 655. Carth. 392. Skin. 560.

(E 5.) Who cannot prescribe.

But, generally, a layman cannot prescribe *in non decimando*. 1 Rol. 653. l. 5. R. 2 Co. 44. Mo. 425. Hob. 297.

As, churchwardens who have lands for the repair of the church; though their office be ecclesiastical. 1 Rol. 653. l. 1. 31.

And therefore, if an abbot and convent, &c. grant land to a layman, or are dissolved, whereby the lands come to a layman; though the abbot had prescribed *in non decimando*, the layman cannot: for the privilege is gone. R. Jon. 373.

So, the pope by his bull could not discharge a subject from payment of tithes after the council of Lateran. 2 Inst. 653.

Yet if an abbot, or prior, was seised of lands discharged of tithes, the present farmer of such lands shall be admitted to prescribe *in non decimando* by force of the st. 2 & 3 Ed. 6. 13. which says, that every person shall pay predial tithes in such manner as of right ought to be paid in forty years before. Mo. 219.

And by that st. s. 4. no person shall be compelled to pay tithes for lands, &c. by law or statute, or by any privilege or prescription not chargeable with payment of tithes, or discharged by composition real.

And, per Hobart, if a person temporal succeeds a body spiritual in discharge, he shall be reputed as a person or body spiritual. Hob. 296.

So, where lands came to the king by the st. 31 H. 8. 13. lands discharged by prescription in the hands of an abbot, &c. shall be discharged in the hands of the king, or his patentee. R. Jon. 373. Vide post, (E 7.)

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[There can be no prescription *in non decimando* against a lay rector, any more than against a spiritual rector; but there may against one who only entitles himself to tithes. H. 1732, Bunb. 325. T. 1739, Bunb. 345. (Com. 643. S. C.)]

(E 7.) By the king, or a patentee of lands given to the crown by the st. 31 H. 8. 13.

So, by the st. 31 H. 8. 13. (which dissolves all houses of religion above 200*l.* a-year value), the king and his patentees shall hold all manors, lands, &c. belonging to such houses, discharged of the payment of tithes, as freely as the abbots, &c. held the same at the day of their dissolution.

And this privilege extends to all lands given to the king by the st. 31 H. 8. 13.

Though they were lands appurtenant to abbeys, &c. given to the king [*] by the st. 27 H. 8. 28. but continued by the king pursuant to a proviso in the same statute, and not dissolved till the st. 31 H. 8.

But lands appurtenant to houses of religion given to the king by the st. 27 H. 8. 28. which dissolved the lesser abbeys, &c. under the value of 200*l.* a-year, are not exempted from payment of tithes. Jon. 3. 185. 370. R. 2 Cro. 608. R. Cro. Car. 425. Jon. 370.

Nor, lands, which came to the crown by the st. 37 H. 8. 4. or 1 Ed. 6. 14. 2 Co. 46. Jon. 4. 185. Mo. 420. 913.

If they are not exempted by a real composition, or *modus decimandi*; though they were after the dissolution granted by the king to a greater abbey dissolved by the st. 31 H. 8. R. Jon. 3. 2 Cro. 608.

Nor, lands which are vested in the king by the st. 32 H. 8. 24. which has the same words as the first clause of the st. 31 H. 8. 13. but not the subsequent clause of discharge. R. 2 Cro. 58. Cont. per three J. Jon. 190. R. Ray. 225. Cont. acc. Mo. 913. Vide Ca. Eq. 225. Dub. Godb. 392. Bridg. 32. Dub.

An abbot, &c. might be exempt from the payment of tithes by the pope's bull, by his order, by prescription, by real composition, or by unity of possession. Jon. 3. 368. 2 Cro. 608. Hob. 296. Poph. 156.

The pope by his bull used to exempt whom he pleased from payment of tithes, and such exemption was allowed for good. Jon. 368.

And though such exemption ceased by the dissolution of the body to whom granted, being personal; yet, if any abbot, &c. had an exemption by bull at the time of the dissolution, the lands shall be now exempt by the st. 31 H. 8. Per Hob. 297. Jon. 3.

So, by divers grants of the pope, several religious orders were exempted from the payment of tithes, *quamdiu propriis manibus terras colebant*. Cod. Ju. Eccl. 701.

But by pope Adrian the 4th, these orders were reduced to Cistercians, Hospitallers, and Templars. 2 Inst. 652.

To whom the Præmonstratenses were added by Innocent the 3d, anno 1215. 2 Inst. 652.

And by the council of Vienna, anno 1311, 4 Ed. 2. the Templars are condemned for heresy; and 17 Ed. 2. their possessions given to the king.

And by the st. 2 H. 4. 4. all orders, which put a bull in execution for discharging lands from tithes in the hands of their tenants or farmers, incur a præmunire.

And therefore, all lands which belonged to an abbey, &c. of the order of

Cistercians, or Præmonstratenses, (for Hospitallers were afterwards dissolved by the st. 32 H. 8. 14. and the Templars before the st. 17 Ed. 2. at the time of the dissolution, by force of the st. 31 H. 8. 13. shall be exempted from tithes, in the hands of the king, or his patentees. Hob. 297. Ow. 46.

Wood or meadow as well as arable. Dy. 277. b. in marg.

[Right of common may be discharged as well as lands. M. 1723. Bunb. 138.]

So, they shall be exempted in the hands of the king's tenant, in respect of his dignity. Ow. 46. 2 Leo. 71.: for the king does not occupy himself; and therefore, his farmer or tenant shall be exempted, if he be tenant for years, or at will, and the freehold is in the king. Mo. 915. Hard. 382.

[*]And in the hands of tenant in tail as well as in fee. R. Hard. 174.

Though there was a subsequent contract or covenant by the abbot, &c. after the council of Lateran to pay tithes. R. Hard. 101.

So, the reversion shall be exempted, if they were in the hands of a lessee for life, or donee in tail, at the time of the dissolution. R. Hard. 190. 4 Leo. 47.

Or, in the hands of a lessee for years, who paid tithes at the dissolution. R. Dy. 277. b. R. Pal. 119. R. 2 Cro. 559. 2 Rol. 142.

But lands purchased by those orders after the year 1215, were not exempted, for the exemption extended only to lands then in their possession. Cod. Ju. Eccl. 701. 2 Inst. 652.

[And if they have paid tithes, it will induce a presumption that they were purchased after. Bunb. 122.]

So, lands which belonged to those orders, shall not be exempted in the hands of any who has them only for years, or for life. R. Hard. 174.

So, lands which escheated to an abbot, and continued in his hands at the time of the dissolution, shall not be exempted. Semb. Hard. 190.

Nor, land granted in tail by an abbot, &c. and in the hands of the donee at the time of the dissolution. R. Hob. 248.

Nor, the lands of a copyholder, held of a manor, which was in the hands of an abbot at the time of the dissolution. Mo. 219. 533, 4.

Nor, lands exempted in the hands of an abbot by reason of his possession, but not discharged at the time of the dissolution. Godb. 1.

Nor, lands in which a man claims *libertatem falcandi*; as, a common. R. 2 Bul. 249.

So, an abbot, &c. might waive this privilege, by composition, &c. Semb. Hard. 383.

So, where an abbey, &c. was discharged by prescription at the time of the dissolution, the king, or his patentee, shall be now discharged by force of the st. 31 H. 8. 13. Cro. El. 206.

And it is sufficient to prove the prescription, if he gives evidence that the abbot, &c. did not pay. R. Cro. El. 206.

[But hearsay and belief is not sufficient evidence of non-payment to shew that the lands were exempt. in Sc. T. 1720, Bunb. 66.]

[If a general exemption is insisted on, but not proved, a partial exemption for one species cannot be admitted in proof. H. 1730, Bunb. 296.]

An abbot, or other spiritual person, might prescribe *in non decimando*; though a layman cannot. R. Cro. El. 206. Vide ante, (E 2.)

But an abbey, &c. could not be discharged by prescription, where it was founded within time of memory, viz. after the beginning of the reign of king R. 1. Hob. 300.

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So, if an abbey was dissolved by the death of the abbot and all the monks, the right to tithes revived. R. Godb. 211.

[Customary tenants in the north have not the freehold ; it is in the lord, so they may prescribe in the name of the lord. H. 2 G. 3. 3 B. M. 1273.]

(E 8.) By a real composition of an ecclesiastical person.

So, an abbot, &c. might be discharged by a real composition, as well as a lay person. Vide post, (E 21.)

[*]A real composition was, when land, &c. was given to a parson, with assent of the patron and ordinary, in recompence of all his tithes ; by which the land was discharged of tithes, and a *modus* paid in lieu of them. Jan. 369.

And this discharge went along with the land, into whatever hands it came. Jon. 369. Cro. Car. 423.

So, by a composition between the convents of two abbeys, *mediantibus abbatibus*, a sum of money might be paid to one abbey for tithes of the lands of the other abbey. Sav. 5.

And if both abbeys come to the king, his patentee shall have the composition against the patentee of the lands : for if the composition fails, the tithes ought to be paid in specie. R. Sav. 5.

So, if an abbot, &c. had a manor and portion of tithes, viz. tithes of the same manor *simul et semel*, and before time whereof, &c. viz. 25 H. 1. granted the manor and tithes to A. and his heirs, rendering 5*s. per annum*, who time whereof, &c. paying 5*s.* to the abbot, and after the dissolution, to the king, have been exempted ; it shall be a good discharge. R. 2 Mod. 321. Skin. 239.

So, a prior composition may be explained by a subsequent. Semb. Hard. 383.

But an abbot, &c. not paying tithes at the time of the dissolution ; it shall not be intended that he was exempted by a real composition, if it be not shewn : but by his personal privilege, which was the usual course. R. Per three J. Cro. Cont. Cro. Car. 423. 1 Rol. 654. l. 40. Jon. 370.

(E 9.) By unity.

So, an abbot, &c. might be exempted from payment of tithes by a perpetual unity of possession, viz. when an abbot, &c. time whereof, &c. was seised of land and also of the rectory of the same parish, where the land lies. R. 2 Co. 47. b. Per Dyer two J. cont. Mo. 46.

Perpetual unity was not a discharge *de se* ; for by the unity the tithes, being collateral to the land, are not extinct ; and therefore they are payable, when the unity ceases. R. Jon. 3. Hob. 297. Pol. 5. R. Mo. 537, 8. 2 Cro. 608.

But, if land was discharged in respect of unity, at the time of the dissolution, it shall now be discharged by force of the st. 31 H. 8. R. 2 Co. 47. Dub. 1 Leo. 332. Sav. 62. R. Mo. 420. 533. Cro. El. 584. 2 Rol. 251.

Though at the time of the dissolution the land and rectory were in lease, if the lessee did not pay tithes. Semb. Pol. 7.

So, though the lessee did pay tithes. Vide Jon. 412. Vide infra.

Yet, unity is not a discharge of tithes : but an exemption only from the payment of tithes, and ought to be pleaded accordingly. Hob. 298. 2 Co. 48.

So, unity does not exempt from payment of tithes, and ought to be pleaded accordingly. Hob. 298. 2 Co. 48.

So, unity does not exempt from payment of tithes, if the unity did not commence by a good title, and was perpetual. Semb. 2 Co. 47. b. Hob. 298.

Or, if it commenced within time of memory ; as, if an abbey, &c. was founded or endowed with the land and rectory after the first year of R. 1. Hob. 298. 1 Rol. 54. Yel. 31.

[*]Or, if the abbot, &c. was not seised of the land and also of the rectory in fee. Semb. 2 Co. 47. b.

If he was seised of a manor and rectory, it does not exempt the copyholders of the same manor. Mo. 219.

Or, if an abbot, &c. or his tenant or farmer had at any time paid tithes, though but part of his tithes, and not the whole. Hob. 298. Pol. 9. R. 2 Co. 48. a.

Or, if there was not an unity of possession at the time of the dissolution, but the land was in lease, and the lessee paid tithes : though there was an unity of the freehold and inheritance of the land and rectory. R. per three J. Mo. 534. Acc. Pal. 119. Vide supra.

Or, if an abbot was seised of the land and rectory in fee, but not at the time of the dissolution. Co. El. 584.

By common law a spiritual person ought to shew specially, how discharged, viz. by bull, composition, &c. except where he was discharged by prescription. R. Hob. 297. 2 Co. 48. Noy. 97.

So, since the st. 31 H. 8. 13. the king or his patentee, who pleads a discharge, ought to plead with the same particularity as the abbot himself. R. Hob. 298. Jon. 6.

And therefore he ought to plead that the abbot, &c. by prescription held the lands discharged of tithes at the time of the dissolution. Jon. 3. Hob. 299.

Or, shew how discharged, viz. by bull, composition or unity. 2 Co. 48. b. Hob. 299. R. 1 Lev. 185.

And if he alleges unity, he ought to conclude, *ratione cujus* he was discharged from payment of tithes. Hob. 298. 2 Co. 48.

And nothing can be traversed but the unity, not the *ratione cujus*, &c. 2 Co. 48. Mo. 534.

(E 10.) By a *modus decimandi*.—What modus is good.—Another recompence in discharge.

So, a man may prescribe to be discharged from payment of tithes, because that a modus has been paid time whereof, &c. in lieu of the same tithes.

And such modus may commence upon a real composition. Jon. 369.

A layman as well as a spiritual person may prescribe in *modo decimandi*. Mo. 531.

And the modus continues though the land came to the rector, if they be afterwards severed. Mo. 531, 2.

And by st. 2 & 3 Ed. 6. 13. no person shall be compelled to pay tithes for any lands, &c. which by prescription, &c. are not chargeable with the payment of any such tithes, or that be discharged by any real composition.

And therefore a parishioner may allege a custom or prescription to give money or other recompence to the parson ; and in consideration of it, to be discharged from payment of tithes in specie.

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As he, who being lord of the manor of B. has paid such a pension time whereof, &c. to the parson, and *ratione inde* has been exempted from tithes within his manor. R. Mo. 485.

That the lord has allotted so much wood to the parson; for which he, and his tenants in the same manor, ought to be exempt from tithes for their under-wood there.

[*] That the parson has such a wood in the same parish rendering 4*d.* to the lord, and therefore the parishioners shall not pay tithes of wood there.

[One penny at Easter, for tithe-hay on a farm of 68 acres, allowed; 1*l.* 6*s.* 8*d.* for hay, small tithes, and Easter offerings, on a farm of 625 acres, allowed. P. 1724, Bunb. 161.]

[Nine cart-loads of logwood for all tithes.]

[A hogshead of cyder.]

[Two-pence per acre, without setting forth when nor by whom established, after a verdict. H. 1729, Bunb. 279.]

[A halfpenny per calf, in lieu of calves.]

[A smoak-penny, in lieu of fire-wood burnt in his house.]

[A halfpenny for wool of each sheep dying between Candlemas and Shear-day.]

[Four-pence per month for wool of every 100 sheep brought in after the 2*d* of February.]

[If ten lambs, one to the rector on St. Mark; if nine, one to rector paying a halfpenny; if eight, one paying a penny; if seven, one paying a penny halfpenny; for less number, no lamb, but a halfpenny to rector for each lamb under seven; and where ten lambs, parishioner takes two, and then rector chuses his one.]

[The same as to pigs.]

[Three eggs for every cock, hen, drake or duck, in lieu of tithe-eggs, chickens and ducks. M. 1731, Bunb. 307.]

[Modus may be established without trial at law, if the parson has no proof. Ibid.]

(E 11.) Another thing for the benefit of the parson.

So, it shall be a good modus, that the parishioner has done more than he need do for the improvement or melioration of the tithes for the benefit of the parson, and in consideration thereof has been excused from tithes for another thing: as, that he bound the corn in sheaves, and afterwards put it in stack for the parson, and therefore has been discharged of tithes of so many sheaves as are not put in stack. Latch, 226.

So, that every parishioner has used at his proper costs to make the grass of the first mowth into hay, and then to deliver the tithe to the parson, and therefore has been excused from the tithes of the after mowth. R. 2 Cro. 42. 1 Rol. 648. l. 46.

Or, has cut the first mowth, and tedded and dispersed it, and then gathered it into wind-rows, and put it in small cocks: for this is more labour and charge than the law requires. R. 2 Cro. 42. Mo. 758. 1 Rol. 648. l. 52.

So, that the parishioner has delivered straw to the parson for his seat in the church, and therefore has been discharged of tithes for his hay. Semb. Cro. El. 277.

That he pays 5*s.* to the clerk, by which the parson is excused from finding a clerk, and therefore he ought to be exempted from tithes. Semb. Cro. El. 71. Vide post, (E 15.)

So, that the parishioer cuts tares, &c. for the beasts of the plough, or cows, and therefore does not pay tithes of them. R. Cro. El. 139.

That he pays a halfpenny for the wool of sheep sold between shearing and Michaelmas. Mo. 911.

[*](E 12.) Though the modus be paid to another.

So, a modus paid to the parson for hay, in lieu of all tithes upon the same land, shall be a good discharge for tithes of the same land, demanded by the vicar. R. Yel. 86. Vide post, (E 15.)

(E 13.) Though there be some alteration in the thing for which the modus is paid.

So, if there be an alteration of the thing for which the modus is paid, the modus continues, if the thing for which be not destroyed : as, if a current upon which a mill is erected, be diverted by the act of God, and the owner removes his mill to it, the modus for the mill remains. 1 Rol. 652. l. 10. Vide post, (E 20.)

If a modus be for tithe of hay in such a close, and it is ploughed for seven years, and afterwards returns to hay ; the modus continues. 2 Sho. 462.

If a modus be of so much a year for tithes of so many acres of land in such a park ; the modus continues, though the park be disparked. Cro. El. (467.)

So, if a modus be to pay a buck and doe generally, for tithes of land in such a park. Semb. Ow. 34.

Or, 2s. for tithes of land in a park, and a shoulder of a deer. R. Godb. 238. Hob. 39. M. 863. 1 Rol. 651. l. 51.

(E 14.) When a modus is not good.—If it be not time whereof, &c.

But a *modus decimandi* is not good, where the thing for which the modus is alleged to be paid is not antient : as, a modus cannot be alleged for tithes of hops. R. 1 Vent. 61. 1 Sid. 443.

[There can be no modus for turkeys, because lately brought to England. M. 1731, Bunb. 307.]

So, if a modus be so large, that it is not possible to be the valuation for such tithes time whereof, &c. : as, if he alleges a modus to pay 2s. 6d. for every tithe-lamb. H. 9 W. 3.

To pay 5s. an acre for tithes of wheat ; 4s. for summer corn ; 3s. for meadow ; 2s. 6d. an acre for pasture. H. 3 Geo.

To pay 6d. for every calf, (which in that country never exceeds 5s. value after three weeks,) M. 5 Geo. T. 7 Geo.

[A modus of 4l. 10s. for a farm of 30l. too rank. P. 1731, Bunb. 301.]

Yet a modus may begin after endowment temp. H. 3. Semb. Godb. 180.

(E 15.) If it does not import a benefit to the parson, &c. beyond what the law requires.

So, if a man alleges a custom or prescription to be discharged of the tithes of such a particular, in respect that he has done what is not more than the law requires, or no benefit to the parson, it will not be a good modus : as if he says, that he pays tithes of his meadow and 2d. for every cow, and there-

fore ought to be excused from tithes for hay out of the fens in the same parish, which he uses for fodder for his cows. R. 2 Cro. 47. Mo. 683.

That he is bound by tenure of such land to maintain *navem ecclesiæ*, [*]and therefore ought to be excused: for it is no benefit to the parson. Vide 1 Rol. 649. l. 50.

That he ought to pay so much to the rector, is no excuse for tithes due to the vicar. Cro. El. 71. Mo. 907. R. 3 Bul. 220. Vide ante, (E 12.)

Or, 5s. *per annum* to the parish-clerk, is not good modus for tithes to the rector. Cro. El. 71. 276, 7. 1 Leo. 94. Vide ante, (E 11.)

So, it is not a good modus, that all the tenants of a manor ought to pay such a rent to the lord, and therefore ought to be discharged of tithes of all their lands in any place.

That he ought to find straw *pro nave ecclesiæ*; and therefore ought to be discharged of tithes for his pay: for the parson need not find straw. R. Cro. El. 276.

That he ought to make the grass upon the first mowth into small cocks, and therefore shall be discharged of tithes of the after-mowth: for it is no more than by law he ought to do. R. Mo. 758.

That the tenants of a manor are discharged, &c. because they pay so much quit-rent to their lord. R. 1 Sid. 258.

Or, maintain a chaplain in the church of D. without shewing that it is in the parish where the manor lies. Semb. 1 Rol. 2.

That he pays one penny for every milch cow, and a halfpenny for every other cow, for tithes of all cows, oxen, steers, calves. R. Cro. El. 446. Vide post, (E 16.)

Or, one penny for every mare, for tithes of all horses, mares, colts. Cro. El. 446.

That for payment of full tithes for sheep which he has upon his land at Candlemas, he shall be exempt for the whole year from tithes for sheep. R. 1 Mod. 229.

That he pays every ninth night and tenth morning all his milk, from the tenth of May till a lamb bleats in the parish, in lieu of all tithes of milk in the parish. R. Carth. 461.

[To pay every tenth evening and morning's milk in kind, from Hoc-Monday (i. e. Monday fortnight after Easter) to 2d November, not good modus for milk. M. 1731, Bunb. 307.]

[By act for inclosing common, the lands divided shall be holden by each person to whom they are allotted, subject to the same charges as their own former lands were; ninety acres are allotted to the owner of S. which was exempt from tithe of corn, grain, and hay (but not of common); the impropiator is not party to the act, and all rights, &c. saved: the ninety acres are not exempt from tithe. P. 3 G. 3. 3 B. M. 1375.]

(E 16.) If it be to pay one species of tithes in satisfaction for another species.

So, it is not a good modus, if a man prescribes to pay one species of tithes in recompence of another species: as, if he allege a prescription to pay the tenth cock of hay, for all the tithes of his hay. R. Cro. El. 786.(a)

(a) The modus in Cro. El. 786. is, the tenth sheaf of corn, the tenth cock of hay, the tenth fleece of wool, the seventh calf, and the parson to pay 1 l-2d., and the eighth calf, if he had eight, and the parson to pay 1d. *et sic usque* ten; and if he had under seven, to pay only 1-2d. for every one, and so after that rate for lambs and colts, and that it was in

[*]Or, a moiety of the tithes in such a close, for all tithes of hay there. Semb. cont. Godb. 120.

Or, the tenth sheaf of corn, for all tithes of his corn. Cro. El. 786. Mo. 278. Sav. 100.

Or, the seventh calf, the parson paying three halfpence; the eighth, he paying a penny; and a halfpenny for every one under seven, in recompence for all tithes of his cattle. R. Cro. El. 786. 139.

Or, a load of hay, for all hay upon his land. Semb. 1 Rol. 172.

A penny for every milch cow, and a halfpenny for every other cow; for tithes of all cows, steers, &c. Mo. 909. 911. 1 Rol. 651. l. 11.

Or, for all cattle or agistments. R. Mo. 454. Cro. El. 446. 475.

Yet if a payment be of a species in recompence of that species and another thing for which no tithes are payable, it seems good: as, to pay the tenth shock of corn, for tithes of all corn, grass, or headlands, and rakings. 2 Leo. 70.

[A custom to pay tithe of wool by the pound and not by the fleece, is not a modus. M. 1 G. 2. Str. 783.]

(E 17.) If it be not a certain recompence.

So, it is not a good modus if the payment be uncertain: as, that he shall pay a penny an acre, or thereabouts, for every acre of his arable land.

That he shall pay 4s. for every day that he ploughs for wheat, and 2s. for every day that he ploughs for barley.

That he shall pay so much for every calf sold, for tithes of all barren cattle; for perhaps he may not have, or may not sell any. Cro. El. 139.

That the inhabitants of such messuages shall pay each 4d. to the vicar, for recompence of his tithes there; for perhaps nobody may inhabit in those houses. R. Cro. El. 139.

That the owner of a manor, or any part of it, pays 4d. for tithes of his herbage; for if he has but a foot, he shall pay. 1 Vent. 3.

That he pays a modus on or about April; for he ought to ascertain the time of payment. Mod. Ca. in L. & Eq. 375.

[A modus to pay 1s. per pound for pasture according to the value of the land, or 1s. per pound according to the value of the rent, is void. H. 1717. Bunb. 20. T. 10 G. Bunb. 174.]

[Distributive modus is not good. Sc. T. 1721, Bunb. 80.]

[Nor, if the time of payment be uncertain. P. 1722, Bunb. 105. T. 1722, H. 1723, Ibid. T. 1725, Bunb. 198.]

[Several customary payments, though they sometimes varied, were established against the tithes of houses in London. P. 1722, Bunb. 106.]

[That the parishioners carry a cart load of turf to the parsonage, not good; cart load uncertain, and no right of turbary alleged. H. 1722, Bunb. 126.]

[A modus of 4s. for tithe hay arising on his farm, is void; as it may introduce a fraud, if he turn all his arable land into meadow, and it is uncertain of what a farm consists. P. 1723, Bunb. 129.]

[*][To pay 3s. 4d. for a score of sheep shorn out of the parish at Easter,

satisfaction for the tithes of all dry cattle, and for all other tithes of corn, hay, and cattle; R. and being only tithes in kind, they cannot be in satisfaction for the tithes of other things than themselves.

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or otherwise when the sheep shall be sold, void for uncertainty. T. 10 G. Bunb. 171.]

[If the day of payment of a modus is omitted in a bill, it is fatal ; but in an answer it may be supplied by evidence. T. 1733, Bunb. 328.]

[Six shillings and eight-pence for every tenth calf, without saying, so in proportion if less than ten, is bad. Ibid.]

(E 18.) If there does not appear a remedy for the modus.

So, if no remedy appears for the modus ; as, if he alleges, that all occupiers of lands within such a vill pay 2s. for all tithes within the vill ; for no remedy appears if any will not contribute : otherwise, if he says, *quilibet occupator* shall pay for his tithes. 2 Keb. 280.

(E 19.) If apparently unreasonable.

So, a modus apparently unreasonable shall be void : as, to pay a halfpenny for tithes of all willows, &c. cut by him in the same parish ; without saying, for willows cut upon his own land. R. Godb. 60.

To pay the tenth lamb of all lambs in the parish. Hob. 329.

To pay tithe of milk at the place where his cows are milked. R. Carth. 461.

[To set out tithes, (as of wool), *absque visu et tactu* of the parson. M. 1732. Bunb. 321.]

(E 20.) How a modus shall be destroyed.

So, a modus may be lost by frequent payment of tithes in specie. Vide Prescription, (G).—Ante, (E 13.)

By neglect to pay the consideration payable as the modus.

So, a modus shall be destroyed, by the destruction of the thing for which the modus was paid ; as, if a modus be of so much for two fullingmills, and they are converted to a corn-mill. 1 Brownl. 32.

Or, a modus be for a pair of stones in such a mill, and another pair be added. 1 Brownl. 32. R. 4 Mod. 45.

If a modus be for a mill on such a stream, and the owner diverts the current, and afterwards erects a new mill upon a new stream. 1 Rol. 652. l. 17.

If a modus be for hay in forty acres, and the owner converts them to tillage ; it shall be suspended during the tillage. Godb. 194. Vide 1 Rol. 651. l. 35.

Or, to hops. Vide 1 Rol. 651. l. 35.

If a modus be to pay a buck or doe for tithes, of such a park, which is afterwards disparked. Cro. El. (467.) Vide Ante, (E 13.)

Or, a buck or doe out of such a park for tithes of land there.

Or, a shoulder of every buck or doe in the park. Vide Cro. El. (467.)

Or, 10s. *per. ann.* for tithes of deer and herbage in the park.

But a modus shall not be destroyed by payment of tithes in specie for 20 years. 2 Inst. 653.

[If parishioners, without consent of parson, divide and enclose a common which was covered by a modus, the modus is destroyed ; but if with the consent of parson, and an act of parliament passed, that all shall enjoy their rights of severalty as they did their rights of common before, it is not destroyed. T. 1748, 1 Vesey, 115.]

[*](E 21.) By a real composition of a lay person.

So, a man may be discharged from payment of tithes by a real composition : as, if he or his ancestor has made an agreement with the parson, by assent of the patron and ordinary, to be free from tithes in specie against him and his successors, upon such a sum to be paid annually to him and his successors. Cod. Ju. Eccl. 705. Vide ante, (E 8.)

Or, in lieu of such land given to the parson and his successors.

And of such discharge every one who has the land shall take benefit. Jon. 368, 9.

So, every owner of land may make composition with the parson for tithes, during the mutual lives and occupancy of themselves. Vide post, (L 2.)

And such composition for a year, by parol, will be good. 2 Cro. 137.

So, it may be for several years, when made by way of retainer for his own tithes. Semb. cont. Cro. El. 249. 2 Cro. 137. But Yel. in the same case semb. acc. Yel. 94.

And if there be a composition by an owner, for him and his assigns ; the assignee shall have the advantage. 2 Cro. 668, 9.

But a real composition shall not be good if it be not by fine or deed. Vide Cro. El. 188. 249.

If it be not for them, and their heirs and successors.

So, since the st. 1 El. & 13 El. 10. there cannot be a real composition. Cod. Ju. Eccl. 706.

[Decrees have been made in chancery (since the restraining statutes) to confirm compositions relating to the rights of the church made by parson, patron and ordinary, but always where they were presumed to be for the benefit of the church. H. 19 G. 2. Wils. 128.]

[So, a composition with a parson during his life, is not good against himself, if it be by parol only. R. 2 Cro. 137. Hob. 176. Yel. 94. 2 Rol. 63. l. 1. R. Cro. El. 188. 249.]

Nor, a composition for several years ; if it be not by way of retainer.

[Composition of the occupier with the agent of proprietor of tithes, binds the principal. P. 6 G. 3. 3 B. M. 1873.]

[And it is good by parol if the corn is severed. Ibid.]

[The same notice must be given to determine a composition for tithes, as between landlord and tenant : and the requisition of due notice has been carried farther in the former case than in the latter ; in the latter, where the tenant controverts the right of the landlord, the defect of notice cannot be set up ; but in the former, though the defendant sets up a modus, which controverts the incumbent's right to tithes in kind, and failing of that, insists it is a composition, he may take advantage of the incumbent's defect of notice, that he will terminate the composition. 2 Brown, 161. C. P. T. 39 Geo. 3. 1 Bos. & Pul. Rep. 458.]

(F) THE SEVERAL KINDS OF TITHES.

(F 1.) Predial.

Tithes are predial, personal, or mixt.

Predial are tithes which arise from the land, spontaneously, or by manurance ; as, tithes of corn, hay, wood, herbs, &c. 1 Rol. 635. l. 10.

So, wine, flax, and hemp are predial. 2 Inst. 649. 1 Rol. 635. l. 17.

[*]So, hops. 1 Rol. 635. l. 21..

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So, all fruits ; as apples, pears, mast, &c. 1 Rol. 635. l. 22. 2 Inst. 649.

(F 2.) Mixt.

Mixt are tithes which arise from cattle and beasts receiving their nourishment upon the land : as, calves, lambs, kids, pigs, chickens, &c. 1 Rol. 635. l. 15. 30.

So, wool, milk, cheese, &c. 1 Rol. 635. l. 30. 2 Inst. 649.

So, eggs. Cod. Ju. Eccl. 691.

(F 3.) Personal.—Who ought to pay them.

Personal are the tithes or *decima pars* of the clear gain which is raised *ex opera personali* of a man, his charges and expences according to his condition and degree being deducted. 1 Rol. 656. l. 25. 2 Inst. 621. Cod. Ju. Eccl. 699. 2 Inst. 649.

By the st. 2 & 3 Ed. 6. 13. every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty, being such person, and in such places as have accustomedly for forty years past paid personal tithes, (except day-labourers), shall pay them yearly at or before Easter, viz. the tenth of his clear gains, his charges and expences according to his estate or degree deducted.

By which it appears that personal tithes are of the nature of oblations : which in some places are due by custom. Vide ante, (B 1.)

Tithes for a fulling, paper, iron mill, are personal tithes. 2 Inst. 621. 1 Rol. 656. l. 34. Vide post, (H. 12.)

So, tithes paid for taking fish, pilchards, herrings, &c. upon the sea. 1 Rol. 656. l. 30.

By the st. 2 & 3 Ed. 6. 13. if any refuse to pay his personal tithes, the ordinary may call him before him, and examine him by all lawful means (other than his own oath) concerning the true payment of them.

(F 4.) Who are not bound to pay them.

But by the st. 2 & 3. Ed. 6. 13. day-labourers are not obliged to pay personal tithes. Vide ante, (F 3.)

Nor, servants for the plough, for their wages. 1 Rol. 646. l. 25.

Nor, an innkeeper, for gain by the sale of wine or beer. Cod. Ju. Eccl. 699. 2 Bul. 141.

Nor, a person, for his gain by money put out at interest. 2 Bul. 141.

Or, for his gain by the sale of a house, &c. R. 1 Rol. 656. l. ult.

Nor, for the clear gain which a man makes by the loan, &c. of any thing, without his labour. Per. Dod. 1 Rol. 656. l. 44.

So, a man may prescribe to pay a *modus* for them. 2 Inst. 657. Vide ante, (E 10, &c.)

(G) GREAT TITHES.

(G 1.) What are.

So, tithes are divided into great or small tithes.

Great tithes are tithes of wood, corn, or hay.

So, tithes of other herbs, which are planted or sown in large quantities, so that the most part of the parish has them, will be great tithes : [*]as, saffron, wood, hemp, flax, &c. R. Hut. 78. Cro. Car. 28. Per Holt. acc. but three J. cont. 3 Lev. 365.

[Peas and beans set and sowed in rows, drilled, hoed, and hand-weeded in a garden-like manner, where great part of the parish was in that culture, and no endowment nor usage, decreed to be a great tithe. 10 G. Bunb. 169. *Contra infra*.]

(G 2.) What not.

[Potatoes, though sown in great quantities in the common fields are a small tithe: for if the quantity will turn small tithes into great, why will it not turn great into small? There is no case determined, that the rule of tithes shall depend on the quantity, and not on the nature. Per Hardwicke C. Sed. qu. T. 1742, 2 Atkyns, 364.]

[Peas and beans set in rows and ranks, and hoed and weeded with the hand, in open fields turned only with the plough, are small tithes. In Sc. affirmed by the lords. H. 1717, Bunb. 19. N. B. It is said there was proof of usage.]

[Clover-seed is a small tithe. H. 1738. Bunb. 344. Com. 633. S. C.]

[But herbs in gardens are small tithes. Pal. 222.]

So, wool, milk, cheese, and the young of animals. 2 Inst. 649.

Lambs. Pal. 220. 222.

So wax, honey, &c. 2 Inst. 649.

So, woad, saffron, &c. generally are small tithes. R. Cro. Car. 28. Hut. 77. Pal. 220. 222.

So, flax, hops, tobacco, &c. Hut. 78. 1 Rol. 643. l. 22. R. Per three J. 3 Lev. 365. Carth. 264. Skin. 361. Semb. 1 Sid. 443. 4 Mod. 184.

Though they are sowed in an open field in thirty or forty acres *sparsim*. R. Cro. El. 467. Mo. 909. R. per three J. Holt. cont. 3 Lev. 365. R. Ow. 74. 4 Mod. 184.

So, a vicar, endowed *de altaragio et minutis decimis*, may be entitled to tithes of wood, hay, &c. if under such endowment he has taken them time whereof, &c. R. 2 Bul. 27.

[Agistment tithe is a small tithe. 1 Wils. 170.]

(H) OF WHAT THINGS TITHES ARE PAYABLE.

(H 1.) Of common right.—Corn.

Tithes are payable of common right of all things which annually increase, either spontaneously, or by the industry of the parishioner.

As, of all corn, viz. wheat, rye, millet, barley, oats, peas, &c.

Of vetches, tares, &c.

Of woad, saffron, hops, hemp, flax, &c.

Though the peas are gathered when green, for sale or swine. Vide 1 Rol. 647. l. 15.

The manner of payment shall be such as the usage or custom of the country allows: as, where it has been usually paid in the sheaf or bundle it shall be a good manner of setting out of tithes.

By Can. Ro. Winchelsy, 1305. *Decimæ de frugibus, non deductis expensis, integræ et sine diminutione, solvantur*. Vide Cod. Ju. Eccl. 692.

But no tithe ought to be paid for the rakings of corn, where it is not dispersed by fraud. 2 Leo. 28. 1 Rol. 379. 1. Rol. 645. l. 30. R. Mo. 278. 910. Cro. El. 475. 660. 702. 2 Inst. 652.

[*]Nor, for peas gathered green to be eaten in his family. 1 Rol. 647. l. 14.

Nor, for stubble. 1 Rol. 640. Lut. Yel. 86, 7. 2 Inst. 652.

So, by custom, tares, vetches, &c. cut when green, for the beasts of the plough, may be exempted from the payment of tithes. R. Jon. 357. R. 2 Leo. 27, 8. R. Cro. Car. 393.

(H 2.) Hay.

So, tithes are due of all grass cut for hay: *de fœnis ubicunque crescant*. Can. R. W. 1305. Vide Cod. Ju. Eccl. 692.

Though it be clover, or other grass of modern use. Carth. 264.

Of every crop, where two or more crops are taken in one year.

Of grass in an orchard, &c. though tithes be paid for the growing there. Vide 2 Inst. 652.

Of hay used for cattle of the plough, or dairy. 2 Cro. 47.

So, of fodder for them, taken out of fens. R. 2 Cro. 47. Mo. 683.

Though it be for cattle which manure his land. Mo. 683.

So, of after-mowth, except where there is a discharge by prescription. 1 Rol. 640. l. 40.

'Tithe of hay may be set out in grass-cocks. R. 1 Rol. 644. l. 5. 2 Mod. Ca. 117. (2d Part.)

But where by custom or usage it has been paid in hay-cocks, it ought to be so. Semb. 1 Rol. 172.

And if it be set out in grass-cocks, the parson may come upon the land to make hay of it; and a custom to the contrary would be void. R. 1 Rol. 420.

But tithes shall not be paid for grass upon headlands left for turning of the plough, if it be cut for hay. Per two J. Lit. 13. Lane, 16.

Nor, for grass cut upon balks in cornfields. 2 Inst. 652.

Nor, for stubble of corn, or fern. 2 Inst. 652.

Nor, generally, for after-mowth or meadow; where a man prescribes to be discharged, as he may, by payment of the tithes of the first mowth. 1 Rol. 640. l. 40. R. 2 Cro. 116. Cod. Ju. Eccl. 706. Mo. 910. Cro. Car. 403. Cro. El. 660. Hob. 250.

Nor, for pasture, after tithes paid of the hay. R. 1 Rol. 640. l. 45. Cod. Ju. Eccl. 706. 2 Inst. 652.

Nor, for grass cut in a meadow for beasts of the plough, if it be not made into hay. 2 Leo. 28. 1 Rol. 645. l. 5.

Nor, for agistment in after-pasture, after tithes paid of the hay. 1 Rol. 640. l. 52. 641. l. 10.

Or, upon the grass of fallows; for the fallow is for the increase of tithes of corn the next year.

Nor, by custom, for grass of headlands cut for beasts of the plough. R. Cro. Car. 393.

(H 3.) Wood.—Of what wood tithes shall be paid.

So, of common right, tithes shall be paid of *silva cædua* which is not great wood or timber. By canon 16 Ed. 3. it was declared, that all wood was *silva cædua et decimabilis*; but by Parl. 17 Ed. 3. & 18 Ed. 3. it was agreed, that no tithes be paid of wood but where they used to be given. By Parl. 21 Ed. 3. that they be paid only of underwood. And now, by the st. 45 Ed. 3. 3. Conf. 47 Ed. 3. if demanded of great wood [*] of twenty years
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or above, a prohibition goes. 1 Rol. 637, 638, 639. l. 35. Pal. 38. Seld. H. of T. 3 vol. 1200.

And though 2 H. 4. and 2 H. 5. it was desired, that all wood of twenty years or more should not be tithable, it was denied. 1 Rol. 639. l. 5. 15.

And therefore now, tithes shall be demanded, unless it be of great wood; for if it be of great wood a prohibition goes: if of *silva cædua* generally, a consultation goes for the tithes of *silva cædua, dum de grossis arboribus non agatur*. 1 Rol. 640. l. 2. Reg. 44.

As, of all underwood under the age of twenty years, tithes ought to be paid.

So, of underwood cut for fuel, though it be above twenty years growth. R. 1 Sid. 300. 1 Lev. 189. D. Pal. 38.

And though there be great trees growing *sparsim* in it. 1 Sid. 300.

Or, a small quantity of oak, &c. be mixed in the faggots of the underwood. R. 2 Leo. 79.

Though used in his house in the same parish. 1 Sid. 447.

So, of oak, ash, elm, or any other trees cut under the age of twenty years, tithes ought to be paid. R. Cro. El. 1. Pertwo J. cont. Cro. El. 55.

[Trees above twenty years growth, if cut and corded for fuel, and the bark; are tithable. Bunb. 98. Sed. qu.]

So, of willow, hazel, holly, maple, birch, alder, thorn, &c. in a country where they are not used for timber (as generally they are not), tithes ought to be paid; though they be above the age of twenty years, and of whatever age or bigness. 1 Rol. 640. l. 25. R. 2 Cro. 199. Mo. 907. Cro. El. 1. 1 Brownl. 94. Hob. 219.

So, of beech, hornbeam, &c. in a country where they are not used for timber. 1 Rol. 640. l. 24.

[Whether beech is esteemed timber in a certain county, shall be tried by issue. H. 1724, Bunb. 192.]

Though growing in the defence of the house, and the cutting them is waste. Hob. 219. 1 Rol. 640. l. 32.

Though cut for fuel or fences, unless where exempted by custom. R. Cro. Car. 113.

Or, are consumed in the house of a farmer, by which means the parson has *uberiores decimas*. 1 Vent. 75.

So, of broom, furze, &c. Cod. Ju. Eccl. 708. 710. Godb. 44.

So, of a nursery of young trees for transplanting. R. Jon. 416. R. Hard. 380. R. 1 Rol. 637. l. 20. Cro. Car. 526.

So, tithes are paid of acorns, &c. of timber; for they increase annually. 11 Co. 49. 1 Rol. 640. l. 37. Cod. Ju. Eccl. 706. cont. where they were not gathered and sold, but eaten by the swine. Hetl. 27. (Vide Lit. 40.) Acc. Mo. 762.

[A parish cannot prescribe *in non decimando* for tithe-wood, and therefore the occupiers must always set forth an exemption. P. 1720, Bunb. 61.]

(H 4.) Of what not.

But since st. 45 Ed. 3. 3. no tithes ought to be paid of great trees of the age of 20, 30, or 40 years; and if they are demanded of such trees, a prohibition goes.

As, of oak, ash, elm, of above 20 years growth; for they are timber throughout the whole kingdom.

[*]So, of beech, maple, &c. or other trees in a country where they are used for timber. 1 Rol. 640. l. 30. Mo. 541. Noy. 30. 2 Rol. 83.

Though oaks, &c. of above 20 years, are decayed, and only fit for fuel, Mo. 541. R. Cro. El. 477.

So, if oaks, &c. are topped within the age of twenty years, and afterwards the lops are suffered to grow above 20 years, no tithes are demandable of these lops; for they are timber. 1 Rol. 640. l. 7. R. 2 Leo. 79.

So, if oaks, &c. of above twenty years be topped or lopped usually within twenty years, no tithes are due for the tops and lops. R. 11 Co. 48. b. 1 Rol. 640. l. 15. Semb. 2 Cro. 100. R. Cro. El. 477, 8. Mo. 908, 762. Godb. 175.

Nor, for trunks of oaks, &c. after twenty years, though become rotten. 1 Rol. 640. l. 10. 11 Co. 49. a. 81. a.

Nor, for the germins of such timber-trees, which grow *de radicibus et stipitibus*, after the tree is cut down. 1 Rol. 640. l. 20. 11 Co. 48. b.

Nor, for the bark of such trees: for it is privileged in respect of the tree. 1 Rol. 640. l. 35. 11 Co. 49. a.

Nor, for a small quantity of underwood, put in faggots with the lops of oaks, &c. R. 2 Leo. 79. Cro. El. 347.

Nor, for roots, or stubs of trees, or underwood cut, for which tithes were paid; if they be rooted up before new germins grow. R. 1 Rol. 637. l. 35. Mar. 58. 64.

Nor, for the wood of fruit-trees, cut the same year in which tithe was paid for the fruit. 2 Inst. 621.

Nor, for wood used for fences. R. Mo. 917. 1 Rol. 644. l. 40. 2 Inst. 652.

Nor, for wood for burning of bricks for repairing the house of the parishioner. Cod. Ju. Eccl. 708. 1 Rol. 645. l. 10.

Nor, for dotards, used for fuel. R. Mo. 908.

Nor, for wood for necessities in the house, and for fences, by which the parson has *uberiores decimas*. 1 Sid. 447.

[No tithe shall be paid of hop-poles (semb. used by the grower.) H. 1717. in Sc. Bunb. 20.]

Nor, for broom, furze, &c. used for firing in the house of the parishioner. R. Cro. El. 609. Mo. 909. 1 Rol. 644. l. 43.

Tithes of underwood shall be paid by him who cuts it.

So, tithes of a nursery of plants shall be paid by him who pulls them up, R. Hard. 380.

(H 5.) Agistment of cattle.

So, of common right, tithes shall be paid for the herbage, or agistment of barren cattle, which yield no profit to the parson. Ca. Parl. 192. R. Sal. 655. R. Hard. 184. Cro. El. 446. 475, 6.

The canon anno 1305 says, *quod de pasturis et pascuis tam communibus quam non communibus decimæ persolvantur secundum numerum animalium et dierum*. Vide Cod. Ju. Eccl. 693.

And tithes shall be paid for the pasture of all cattle not profitable to the parson. Cod. Ju. Eccl. 706.

As, if a parishioner buys cattle, which he depastures for sale. R. Cro. El. 475, 6. 1 Rol. 647. l. 5.

Though they be beasts of the plough, or for milking; if the owner [*] does not use them for such use, but pastures them for sale. Cod. Ju. Eccl. 707.

So, if he buys oxen, steers, or horses, and sells them when fatted. 1 Rol. 647. l. 17. 22. 29.

Or, rears young cattle, and sells them. 1 Rol. 647. l. 25.

[Tithe for yearlings. M. 1721, Bunb. 90.]

So, if he uses them for the plough or pail covinously, and only for a colour.

So, beasts of the plough, which are disused for the plough and fatted for sale, ought to pay tithes for the time after they are disused. R. Ca. Parl. 193.

So, if an innkeeper depastures the horses of his guests. R. Hard. 35.

Or, any person depastures for hire. R. Cro. El. 476.

Or, sheep are fed upon turnips for sale after shearing; though tithes of the wool were paid. R. Ca. Eq. 231, 2.

So, if a man of another parish holds land in the parish of B. and there depastures cows, horses, or other cattle for plough and pail, but does not use them in the parish of B. R. 5 Mod. 96. R. Hard. 184.

So, if he uses part in part, he shall pay tithes for the residue. 5 Mod. 97.

So, if a man agists cattle, part profitable and part unprofitable; he shall pay tithes for herbage of those which are unprofitable. Cod. Ju. Eccl. 707. Poph. 197.

Or, part with cattle for the plough, and part with the cattle of a stranger. 2 Rol. 191.

If the owner of the soil agists the cattle, he pays the tithes. Jon. 254. 1 Rol. 656. l. 15.

If he lets the herbage, the lessee shall pay: for it ought to be paid by the occupier. R. Hard. 35.

[Tithes for depasturing unprofitable cattle shall be paid by the occupier of the ground, not by the agistor. H. 1715, 1720, in Sc. Bunb. 3.]

[If the cattle be fed on a common, the suit must be against their owner; for the owner of the soil has no profit by it. Ibid.]

If all the herbage be taken by the cattle agisted, the tithe ought to be paid by the owner of the cattle: for he is the occupier. R. Hard. 184.

The sum paid for agistment shall be according to the usage of the place.

Sometimes the tenth part of the yearly value of the land. Hard. 35. 184.

Many times the twentieth part.

Or, the tenth part of the sum received for the agistment. Cod. Ju. Eccl. 707.

[Unprofitable cattle shall pay in proportion to the number of cattle, and value of the ground. 1713, in Sc. Bunb. 1.]

But no tithes are payable for the agistment, or herbage of cattle, which are profitable to the parson: as, for sheep for sale; for they pay tithes of their wool. 1 Rol. 647. l. 20.

[If sheep are depastured in the parish three or four months after they have been shorn, and then removed into another parish, and shorn there; tithe of herbage shall not be paid for them. H. 1731, Bunb. 313.]

So, for oxen, steers, horses, &c. used for the plough in the same parish, for the parson has the profit of their labour in his tithes of the corn. R. Hard. 184. 1 Rol. 646. l. 30. 45. Win. 33. 2 Inst. 651. Vide Cro. Car. 237.

[*][Vetches and clover cut, and given green to cattle used in husbandry, pay no tithes. Semb. H. 1729, Bunb. 279.]

Nor, for cows, sheep, &c. used for the pail in the same parish: for the

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parson has tithes of their milk, &c. R. Hard. 184. 1 Rol. 646. l. 30. Vide Cro. Car. 237.

Nor, for cattle fatted for the victuals of the family of the owner in the same parish. 1 Rol. 647. l. 10. R. Cro. Car. 237.

Nor, for horses for the riding of the parishioner himself. R. 1 Bul. 171. Adm. Poph. 126.

So, no tithes are due for agistment of beasts *feræ naturæ*; as, deer, conies, &c. without special custom. Vide post, (H 14. 16.)

Nor, for the skins of the cattle. 1 Rol. 646. l. 7.

Nor, for young cattle reared for the plough, or for the pail. 2 Rol. 646. l. 35. 40. Mo. 910. 2 Inst. 651.

So, no tithes are due for agistment when tithes are paid for hay of the same land in the same year. R. Yel. 86.

(H 6.) The young of cattle.

So, of common right, tithes are payable of the young of animals.

As, of colts, kids;

Of calves, lambs, pigs, &c.

The manner of payment by the common law is generally conformable to the canon. Semb. Cro. Car. 403.

By a provincial canon anno 1305, *pro sex agnis et infra, sex obolidentur pro decima; si septem sint agni, septimus detur pro decima rectori, qui tres obolos solvat parochiano. Si rector octavum recipit, det denarium; si nonum, det obolum, aut expectet ad alium annum, si maluerit; et tunc habeat secundum aut tertium agnum de agnis secundi anni.* Vide Cod. Ju. Eccl. 692. But this part which allows the waiting for his tithes to another year, is not agreeable to the common law, which requires an annual payment of tithes.

By another canon, *incerti temporis, agni, vituli, pulli, equini, et alii fetus decimales, decimentur habitatione ad loca ubi nutriuntur et oriuntur.*

[Tithe of lambs is not divisible, but must be paid where they fall.]

[If sheep are kept in A. all the year till Christmas, when they are ready to lamb, and then carried to defendant's own land in B. where there is a small modus for lambs, and there kept till Lady-day for convenience of forage, and then brought back to A.; this is not sufficient evidence of fraud, M. 1723, Bunb. 139.]

[N. B. Two barons thought at first that issue should be directed, to try fraud or not fraud.]

And the same manner usually prevails for tithes of calves, kids, pigs, &c. which the canon *supra* prescribes for lambs.

If the number be less than the canon mentions, the tenth part of the value is usually paid, unless where custom otherwise determines.

[The tithe of an odd number shall be paid according to the value and not carried over to next year. T. 1725, Bunb. 198.]

The time of payment is when the young is weaned, and can live without the dam; unless where custom prescribes a certain time or age.

[The general rule of tithing lambs is when they are capable of living without the dam. T. 1720, Bunb. 133.]

But, by custom, a man may be exempted for the young of cattle nursed for the pail or plough. R. Cro. El. 702. Mo. 910.

[*] Payment of tithes for the young of animals ought to be by each owner severally.

Though the sheep of several are depastured together in one flock.

(H 7.) Wool.

So, tithes ought to be paid of the annual product of animals ; as, of wool, milk, cheese, &c.

And it shall be of the wool, though the sheep die of the rot, or other disease.

Though the owner kills or sells his sheep. Vide 1 Rol. 646. l. 8.

Payment of tithes of wool shall be where the sheep are shorn, generally, and at the time of the shearing.

But a custom to pay at Lammas is good. Mo. 910. Cro. El. 702.

But by canon 1305, *si oves alibi æstate et alibi in hieme nutriuntur, dividenda est decima.* Vide Cod. Ju. Eccl. 692.

And *decima lanæ* shall be paid, as well as *de agnis, ubi sunt sex vel septem agni, &c.*

[Tithe shall be paid of the wool of lambs, though the lambs tithed two months before. M. 1731, Bunb. 90.]

So, if sheep be sold a little time before shearing, into another parish ; each parson shall have his proportion of the tithes. Per Williams, Lane, 16.

So if wool be taken from sheep killed, tithes shall be paid for it. 1 Rol. 646. l. 7.

So, if cut from the necks to prevent flies, &c. without more. R. 3 Bul. 242.

But no tithes shall be paid for wool to the parson of a parish, where the sheep were not thirty days.

So, where tithes are paid of the fleece, nothing shall be paid for the locks and belts. Vide 1 Rol. 646. l. 5.

Nor, for wool shorn from the neck about Mich. to prevent the sheep being caught in the briars. 2 Rol. 645. l. 45. 50.

Nor, for the birling of sheep, without fraud. 1 Rol. 645. l. 50.

(H 8.) Milk.

By the canon 1305, *de lacte decima solvetur in caseo tempore suo, et in lacte in autumnno et hieme ; nisi parochiani velint redemptionem facere ad valorem decimæ.* Cod. Jur. Eccl. 692.

But by custom, sometimes it shall be paid in specie, throughout the whole year.

Sometimes cheese only shall be paid in lieu of tithes of milk. Adm. Godb. 329. R. Cro. El. 609. Mo. 909.

So, a custom to pay the tenth cheese made between the 1st of May and 1st of August, in lieu of all tithe of milk, is good. R. Cro. El. 609. Mo. 909.

Or, to deliver the tenth quart of milk at the parson's house. Per Poph. Cro. El. 609.

If no custom interferes, the milk shall be paid to the parson in kind. Adm. 2 Brownl. 31.

And it is sufficient to deliver it where the tithe arises without carrying it to the church, or the parson's house. Cont. Ray. 278. Carth. 462. Cont. where paid in cheese. Scmb. Ley. 70. (Vide Pal. 341, 381. 2 Rol. 328.) —Per Raymond, it shall be delivered at the parson's house ; [*]per three other Barons, at the church porch : and so decreed. Ray. 278.

So, by a canon, *incerti temporis, decima lactis et casei de vaccis et capris ubi cubant et pascunt solvatur.* Vide Cod. Jur. Eccl. 693.

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Si cubant in una parochia, et pascunt in alia, inter rectores dividatur. Vide Cod. Jur. Eccl. 693.

But where milk is paid in kind, there shall be no tithe of the cheese.

Or, for the time that tithes are paid of the cheese, there shall be none of the milk. Vide 1 Rol. 651. l. 20. Cro. El. 609.

Milk, where custom does not alter it, shall be paid at every tenth meal; not the tenth part of every meal. R. Ray. 277.

[Tithe milk ought to be paid by every tenth meal. H. 1717, Bunb. 20.]

[The parishioner is, *de jure*, obliged to pay every tenth meal; to milk the cows at the usual place of milking into his own pails. The parson is obliged to fetch it away from the milking-place in his own pails, at a reasonable time; and if he does not before the next milking-time, the parishioner may pour the milk on the ground. P. 1721, Bunb. 73.]

But a custom to pay the tenth meal for such a time, in lieu of all tithe of milk, is not good. Cro. El. 609.

Or, a meal of the ninth day at evening, and the tenth day in the morning, till an ewe has a lamb that bleats. R. Sal. 656. Carth. 461.

(H 9.) The young of fowls.

So, tithes ought to be paid of the young, or of the eggs of all tame and domestic fowls: as, of geese, ducks, swans, turkeys, hens, &c.; cont. of turkeys. Mo. 599. But acc. as to turkeys, per Barons, M. 5 G. 2.

So, of young pigeons in dove-cotes or holes, which are for sale. R. 1 Rol. 635. l. 42. 644. l. 50.

So, of honey and wax of bees in the hive. R. 1 Rol. 635. l. 40. Cro. Car. 559. Jon. 447. Semb. so by custom. F. N. B. 51. G. Cod. Jur. Eccl. 707.

Of geese, ducks, swans, the tithes are usually paid in the young, if custom does not otherwise determine.

Of turkeys and hens, in the eggs.

But no tithes are paid of the young where the eggs are paid; nor *contra*. 1 Rol. 642. l. 7.

So, no tithes are paid of animals, or fowls, which are *feræ naturæ*, without a special custom. Vide post, (II 14. 16.)

Nor, of the young or eggs of pheasants or other fowls, which are kept near the house by the clipping of their wings; for they are not reclaimed. R. 1 Rol. 636. l. 10. Mo. 599.

Nor, of pigeons in a dove-cote, used for the family, without a custom. R. 1 Rol. 642. l. 43. 644. l. 45. 52.

Nor, of bees, where a custom is alleged, that by tithes of the wax and honey, and the charge of hives, and maintaining them in winter, he ought to be discharged. Cro. Car. 403, 4. 1 Rol. 651. l. 5.

So, by some, without such allegation: for they are *feræ naturæ*. 1 Rol. 651. l. 5.

[*](H 10.) Fruits, seeds, roots, &c.—When they shall be paid, and how.

So, of common right, tithes are payable of all fruits and plants which renew yearly: as, of apples, pears, plumbs, and other fruits in orchards, or gardens. Vide 2 Inst. 652.

By the canon Rob. Winchelsey, 1305, *decimæ solvantur de fructibus ar-*
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borum, seminibus omnibus, et herbis hortorum, nisi parochiani competentem redemptionem fecerint pro talibus decimis. Vide Cod. Jur. Eccl. 692.

So, of crabs, mast, &c.

[Of black cherries, though they grow wild in hedges and waste places, and serve for fencing the ground. M. 1724, Bunb. 183.]

So, of all seeds of hemp, flax, herbs, &c. if tithes were not paid of the hemp, flax, &c. itself.

So, of acorns, if they are gathered and sold. Het. 27. Cod. Ju. Eccl. says of acorns, generally. 706. So, 11 Co. 49. a.

So, of all roots; as, turnips, carrots, parsnips, &c.

So, for pease, beans, &c. for sale, or the feeding of hogs. 1 Rol. 647. l. 15.

So, of all herbs.

And tithes of fruits, roots, and herbs, ought to be paid when they are gathered; or some rate for them.

Though the owner permits another to gather them. Cod. Ju. Eccl. 707.

[Of turnips, though sown after the corn is cleared, and fed with sheep and barren cattle, and plaintiff has received tithe of lambs and wool before. H. 1751, Bunb. 314.]

[By st. 31 G. 2. c. 12. tithe of madder is settled at 5s. per acre.]

(H 11.) When not.

But tithes shall not be paid of seed, when it was paid of the herbs or plants themselves: *nor e contra*.

Nor, for acorns which fall from the oak, and are gathered and eaten by hogs. Het. 27.

So, tithe shall not be paid for fruit stolen; for it is not due till it be gathered by the owner, or with his consent. Cod. Jur. Eccl. 707.

(H 12.) Mills.

So, for a mill, ancient or new, some tithes are due. 2 Inst. 621.

And by Art. Cleri. 9 Ed. 2. 5. where a prohibition for tithes of a new mill was prayed to be allowed, it was denied; and decreed, that such prohibition never should be granted.

And this act extends to all mills, public or private, as a fulling, paper, iron mill, &c. as well as a corn-mill. 2 Inst. 621.

By the canon Rob. Winchelsey, arch. Cant. an. 1305, *de proventibus molendorum decimæ fideliter et integre solvantur, viz. decimæ granorum molitorum ad molendinarium pertinentium, tanquam fructuum prædialium, expensis non deductis*. Lind. 195. Vide Cod. Jur. Eccl. 692, 3.

So, where by usage the tenth toll-dish has been paid, it shall be good, though it be a predial tithe, and not a personal. 2 Inst. 621.

[An ancient corn-mill ought to pay the tenth toll-dish, which being a tenth part of the thing itself, is a predial tithe, and due of common [*]right. Per Price B. and Montague B. Contra, per Bury C. B. and Page B. It is a personal tithe, and not due of common right; and (this) not having paid, is now exempt by st. 2 & 3 Ed. 6. P. 1721, Bunb. 73.]

And the tenth toll-dish seems the proper payment of tithes of a corn-mill. Cont. 2 Inst. 621. Acc. 1 Rol. 656. l. 35. 2 Rol. 84. Per Holt, Sho. 281.

So, by prescription, a modus may be paid for an antient mill. Sho. 281. 4 Mod. 45.

But tithes for a fulling, paper, iron mill, &c. are properly a personal tithe: [*471]

for no tithes in kind are due. 2 Inst. 621. 1 Rol. 641. l. 15. 656. l. 34. 1 Rol. 405. Semb. 2 Rol. 84. 2 Cro. 523. Cont. Semb. 1 Rol. 641. l. 20. Vide ante, (F 3.)

So, for a copper-mill. Lit. 314.

So, for a tin-mill, lead-mill, &c. 2 Rol. 84.

So, for a glass-house, &c. Lit. 314.

And if but a personal tithe, then where no tithes are used to be paid, none are due. Vide st. 2 & 3 Ed. 6. 13. 2 Rol. 84. 1 Rol. 405. 3 Bul. 212.

So, an ancient grist-mill may be discharged from payment of tithes by prescription.

So, if a mill is erected *de novo*, upon land discharged of tithes by payment of a modus; the mill shall not pay tithes, but the antient modus. R. 1 Rol. 651. l. 30. 2 Inst. 490.

So, if a modus be for two mills, and the water-course being diverted by the act of God, one mill is removed to the watercourse; no tithes, but the antient modus shall be paid. R. 1 Rol. 652. l. 10.

Yet if a mill be erected *de novo*, upon land discharged by the st. 31 H. 8. 13. it shall pay tithe. R. 2 Cro. 429.

So, if a modus be for a house and mill, and another mill is newly erected within the house; it shall pay tithes: for it is not merely a predial, but in part a personal tithe. Semb. 1 Rol. 652. l. 25.

So, if a modus be for two mills, and the stream is diverted by the act of the party, and one mill is removed to it; it shall pay tithe. R. 1 Rol. 652. l. 20.

So, if tithe is payable at the mill, it shall not be paid for corn, for which tithe was paid the same year to the same parson. 2 Inst. 652.

[If there is an antient mill under a building, worked with one wheel, and the owner under the same roof erects two new wheels, and two new pair of stones, they are to all intents two mills, and cannot be recovered by the same modus. M. 1743. 3 Atkins, 17.]

[If there are two antient mills in one parish paying tithes, and the owner of a fulling-mill covered with a modus turns it into a corn-mill, it shall pay tithe. Ibid.]

[Where two pair of stones are erected instead of one, a modus is destroyed, because the miller can grind double quantity. Ibid.]

[If there were two fulling-mills and a corn-mill under the same roof, and the fulling-mills are turned into corn-mills, it is the same as if two new mills were erected. Ibid.]

[Fulling-mills only pay personal tithes. Ibid.]

[Corn-mills pay the tenth dish. Ibid.]

(H 13.) Tithes for hemp, flax, &c. ascertained.

So, by st. 3 W. & M. 3. revived by 11 & 12 W. 16. and continued for seven years, every acre of land not discharged by modus, and sown with [*]hemp or flax, shall pay 5s. and no more for tithes, and so proportionably, &c.—Continued by other acts, and made perpetual by 1 Geo. st. 2. c. 26.

(H 14.) Of what things tithes are not payable, of common right.

But no tithes are payable, of common right, for a house of habitation: for tithes are paid for things annually renewing by the act of God. 11 Co. 16. a. 1 Rol. 636. l. 40. Hob. 11. Vide Cro. El. 276.

Nor, for rent reserved upon a house or land. 11 Co. 16. a. 1 Rol. 636. l. 43.

Nor, for profit made by sale of a house. R. 1 Rol. 656. l. 55.

So, of common right, tithes are not payable for things parcel of the freehold: as for quarries of stone, &c. 1 Rol. 637. l. 5. R. Cro. El. 277. Mo. 908. 2 Inst. 651. Seld. 3 vol. 1201. 2 Leo. 79.

Or, for coals. 1 Rol. 637. l. 7. 2 Leo. 79. 2 Inst. 651.

Or, tin. 1 Rol. 637. l. 12. 2 Inst. 651.

Or, for lime, or chalk. R. 1 Rol. 637. l. 17. Het. 14. 2 Inst. 651.

Or, for lead, copper, or other ore. 2 Ver. 46. Het. 14. 2 Inst. 651.

Or, for gravel, or clay.

Or, for brick, or tile, &c. R. 2 Mod. 77. 2 Inst. 651.

Or, for turf used for fire. R. 1 Rol. 637. l. 10. 2 Inst. 651.

Or, for flags, marl, chalk. 2 Inst. 651.

So, no tithes are due, of common right, of things which are *feræ naturæ*: as of deer in a park. 2 Rol. 458. 2 Inst. 651.

Nor, of conies. R. 1 Rol. 635. l. 45. Per two J. Lit. 13. Hard. 188. Semb. 2 Rol. 458.

Nor, for fish taken in the high sea: for there is only a personal tithe due, *deductis expensis*. R. 1 Rol. 636. l. 20. Cro. Car. 264. Vide post, (H 16.)

Nor, for fish taken in a common river. R. 1 Rol. 636. l. 5. 25. Cro. Car. 339. R. Het. 13.

Nor, for doves or pigeons. 2 Mod. 77. Per cur. cont. 2 Rol. 2. 1 Rol. 635. l. 42.; but this seems intended by custom, for they are not due of common right where consumed in the house of the owner. Per cur. 1 Rol. 642. l. 43. 644. l. 45. R. Lit. 311. Het. 27. 147.

Though the owner has no dove-cote, but pigeon-holes fastened to his house. 1 Rol. 644. l. 52.

Yet if the owner sells his young pigeons, tithes are due. 1 Rol. 644. l. 50. Per Hendon, Lit. 311. Het. 147. Vide ante, (H 9.)

So, tithes are not paid of dogs, cats, &c. 12 H. 8. 4. b.

[Of headlands only large enough to turn the plough upon. M. 1724, Bunb. 183.]

(H 15.) What are exempted for seven years.

So, by st. 2 & 3 Ed. 6. 13. all barren heath or waste ground (not otherwise discharged) which paid no tithe by reason of its barrenness, if improved, shall pay tithes after seven years after its improvement.

And therefore, such barren and sterile lands are exempted from tithes for seven years. 2 Inst. 655, 656.

[*]So, by the same stat. if they paid any tithes, till seven years after improvement they shall pay no other tithe than before.

And if it be barren as to tillage, and be afterwards improved for tillage, it shall be exempted for seven years; though it paid tithes of lambs and wool before. 2 Inst. 655, 656. Cont. Het. 147.

So, heath, or land which only produces a flower in autumn upon which the cattle and sheep brouse, or flags, or turf for fuel. 2 Inst. 656.

But the lands excused are such as are barren in their nature, and not by bad husbandry. R. Mo. 909. Cro. El. 475. Vide 2 Inst. 656.

And therefore, fenny land shall not be excused, though it be drained. Mo. 430. 3 Bul. 166.

If land, after being grubbed up, will produce nothing without being dunged or chalked, it is within the statute; if it will produce one crop with only ploughing, it is not. T. 1748, 1 Vesey, 115.]

[Nor, wood lands grubbed, and afterwards sown with corn, or grass. Bend. 80. 2 Inst. 656. H. 1723, Bunb. 159.]

Nor, land overgrown with thorns and bushes, though it be cleared by industry. R. Cro. El. 475. 2 Inst. 656.

Nor, a salt-marsh ; though by a great charge enclosed or recovered from the sea. R. 3 Bul. 166.

Nor, a marsh surrounded, for want of cleansing the sewers or ditches, or by accident, or inundation, when afterwards recovered. 2 Inst. 656.

So, lands enclosed with hedge and ditch, are not exempted, as waste or heath. Bend. 80.

(H 16.) Of what things tithes are due by custom.

Yet, by custom or prescription, tithes may be due for rent of houses in an antient city or borough. R. 11 Co. 16. a. Qu. 1 Rol. 642. l. 30. Adm. by a proviso in the st. 2 & 3 Ed. 6. 13. s. 12.

But this does not extend to a house newly erected. 1 Rol. 642. l. 35.

[Houses in St. Saviour's Southwark. H. 1721, Bunb. 102.]

So, by custom, tithes may be due for things which are parcel of the freehold ; as, for a lime kiln. 1 Rol. 642. l. 50. Het. 14.

For salt. 1 Rol. 642. l. 52.

For iron ore, or lead ore. Het. 13, 14.

So, by custom, they may be due for things *feræ naturæ* : as, for fish taken in a river, or the sea. Semb. 1 Rol. 636. l. 20. R. Cro. Car. 264. Cro. Car. 339. Adm. by the st. 2 & 3 Ed. 6. 13. s. 11. Pal. 527. Het. 13.

[Of fish taken in the adjoining seas by occupiers of fishing net or craft kept in the parish, by parishioners or others. M. 1728. On trial at bar ; and affirmed, on appeal to the Lords. Bunb. 256.]

[A double tithe may be payable (as of fish) ; one may be due by custom, and another of common right. P. 1719, Bunb. 43.]

For eonies. 1 Rol. 635. l. 50. Lit. 13. Hard. 188. 1 Vent. 5. Het. 13.

So, for doves or pigeons. 1 Rol. 642. l. 43. 644. l. 34. 1 Vent. 5.

And where tithes are not due by the common law, but only by prescription, the parishioner may prescribe to pay the twentieth fish, &c. or other share in lieu of the tithe. 1 Lev. 179.

So, for great trees. 1 Rol. 642. l. 38.

[*]Or, for wood cut to be consumed in the house of the owner. 1 Rol. 642. l. 46.

So, a man may prescribe for tithes of some things for which no tithes are due of common right ; as, by the custom in Wales, for tithes of goods given in marriage ; but this is now taken away by the st. 2 & 3 Ed. 6. 13. 2 Inst. 664.

(I) THE MANNER OF PAYMENT.

(I 1.) They ought to be severed from the nine parts.

How tithes of corn, hay, and wood, shall be paid, vide ante, (H. 1, 2, 3, 4. 10. 12, 13.)

[The tithe must be set out before the farmer remove his nine parts ; therefore he may not throw nine sheaves into the cart, and leave the tenth for the tithe. H. 1724, Bunb. 186. N. B. this is called tithing by the fork in that neighbourhood, and is a very fraudulent method of tithing, being in effect tithing *absque visu et tactu*.]

How agistment, or increase of cattle and poultry, vide ante, (H 5, 6, 7, 8, 9.)

By the st. 2 & 3 Ed. 6. 13. every subject shall justly, without guile, set out, divide, and pay all manner of predial tithes, in such manner as hath been of right used for 40 years past.

And therefore, if he does not sever the tenth from the nine parts, it is within the statute.

Or, if he severs, and afterwards carries the tithes severed; for this is a fraudulent severance. 2 Inst. 649.

Or, grants the tithes, before severance to A., and immediately after severance A. carries them away. 2 Inst. 649.

So, by st. 2 & 3 Ed. 6. 13. at the tithing of predial tithes, it shall be lawful for any to whom tithes are due or his servant, to see his tithes truly set forth, and severed from the nine parts, and the same to take and carry away.

And therefore a custom that tithes shall be set out *absque visu et tactu* of the parson, is not good. 2 Vent. 49. R. Hob. 107.

(I 2.) But there needs no notice of the severance.

But notice need not be given when tithes are set out, though it is required by the ecclesiastical law. R. 2 Vent. 48. Acc. Carth. 143. Per Hutton, Noy, 19.

So, if there be two impropiators, he need not divide his tithes into moieties when they are severed. Latch. 24. 228.

Yet before an action on the case is brought for not carrying away his tithes, notice of the severance shall be given. Vide post, (L 3.)

[Notice of severance is not by common law necessary even to support action on the case for not fetching them away in time: but a custom to give notice is good, and slight evidence will support such custom. P. 6 G. 3. 3 B. M. 1891.]

[*](K) CITIES BELONG TO THE SUCCESSOR FROM THE DEATH, &c. OF THE LAST INCUMBENT.

By the st 28 H. 8. 11. the tithes, fruits, oblations, &c. rents, and all profits belonging to any archdeaconry, parsonage, &c. or other spiritual promotion, &c. arising during vacation, shall belong to the person next presented, promoted, instituted, &c.

And if any ordinary, or any other, take them, and refuse to render them to the next incumbent, or hinder his taking, &c. he shall forfeit treble the value, &c.; a moiety to the king, a moiety to the next incumbent, save the charge of the cure and collecting the tithes, &c.

And therefore, the tithes belong to the successor from the death of the former incumbent; though another officiates for 10 years before the successor be instituted and inducted. R. Hard. 329.

But by the st. 28 H. 8. 11. the executor of the former incumbent shall have the corn of the glebe sown by his testator.

If the testator makes a lease, rendering rent payable at Lady-day and Michaelmas, and dies after all the profits of the year received, but before Michaelmas, the next incumbent shall not have a bill for the rent due at Michaelmas, without making the executor a party. 2 Ver. 136. 204.

[Sequestrator alone cannot sue for tithes. T. 1692, Bunb. 192.]

[If the incumbent sue the sequestrator, the bishop must be made a party. 11. 1724, Bunb. 192.]

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(L 1.) WHEN TITHES SHALL NOT BE PAID.

But by st. 2 & 3 Ed. 6. 13. no person shall be sued for, or pay any tithes for any lands, &c. which by the laws and statutes of this realm, or by privilege or prescription are not chargeable, or are discharged by real composition. Vide ante, (E 1, &c.)

(L 2.) A parson shall not have tithes during a lease or composition for them.

If a parson leases his tithes to another, he cannot afterwards demand tithes of his parishioner during the lease. Vide ante, (E 21.)

So, if he leases or makes a composition or agreement with any parishioner for his own tithes. R. 1 Lev. 24.

Though it be an agreement by parol for the life of the parishioner, if the plaintiff so long continues parson. R. per tot. cur. 1 Lev. 24.

But an agreement by a parson with a parishioner, to take a composition of so much as long as he continues parson, binds only at will, if it be by parol. R. Hard. 203.

So, a lease of tithes above a year shall not be good by parol. Godb. 354. Ow. 103.

Nor, any lease to a stranger, though it be but for a year. R. Godb. 374. Latch, 176.

[A composition, by way of retainer, by parol, is good only for one year; a lease of tithes by parol, even for one year, is void. 1715, in Sc. Bunb. 2.]

So, a covenant by a parson, that his parishioner shall not pay tithes, and by the parishioner, to pay so much for a year, shall be no [*]discharge of a suit for tithes: for it rests in covenant. Poph. 140. 2 Lev. 73.

Yet such a composition by parol excuses the parishioner from damages upon the st. 2 Ed. 6. 13. so long as the parishioner has no notice that the parson will determine it. R. Hard. 203.

So, if the parson sues in the ecclesiastical court after such a composition, a prohibition goes. Godb. 333.

So, if a composition for so much *per annum* be made *quamdiu placuerit*, the parson cannot determine his composition after the corn sown. Per Hale, Sal. 414. Hard. 203.

[It is time enough to give notice, to determine a composition, before reaping the corn, or picking the hops, but not after. Per Price B. Bunb. 15. Sed. qu.]

Neither shall he avoid it for the time passed, by notice to determine it after the day of payment incurred. Hard. 203.

[A composition cannot be determined as to part, and continued as to the rest. T. 1717, in Sc. Bunb. 15.]

(L 3.) He ought to take them away within a reasonable time, and herein of the consequences of not removing them.

When the tithes are severed from the nine parts, the parson ought to watch them till he carries them away: not the owner of the land, &c. Noy, 31.

If the parson does not take away his tithes within a reasonable time, but suffers them after severance to continue upon the land to the damage of the parishioner, an action upon the case lies by him against the parson. Pal. 341. 381. Noy, 31.

So, if the parson will not take his tithe-cheese after notice to take it. Semb. Cod. 330. 332. R. per three J. Pal. 341. 381. Noy, 31.

So, a parishioner may distrain tithes as damage-feasant, which continue upon his land for an unreasonable time, to his damage. Semb. 3 Bul. 336.

But before an action upon the case against the parson, notice of the severance ought to be given to him. (Vide 2 Vent. 48. & 1 Rol. 643. l. 38. Qu. if not Semb. cont.)

So, the parishioner ought to shew how long the tithes continued upon his land after notice.

So, a tender of the tithe-cheese ought to be made, before an action is maintainable for not taking it. R. per two J. Pal. 382.

So, if the owner takes tithes severed damage-feasant, he ought to shew that the tithes continued a long time upon the land. R. 3 Bul. 336.

[Though the proprietor of tithes does not remove them in a convenient time, the owner of the land cannot put in his cattle and depasture them. C. P. E. 8 & 9 W. 3. 1 Ld. Raym, 187. B. R. M. 39 G. 3. & T. R. 72.]

(M) REMEDY FOR TITHES.

(M 1.) In the ecclesiastical court.—By spoliation.

Remedy for tithes lies in the spiritual, or temporal court. The remedy in the spiritual court is either for the right, or the detaining of tithes.

[*]In all cases, where the right of presentation does not come in question, a spoliation may be sued in the spiritual court for the church itself, or for the profits of the church, by one incumbent against another. F. N. B. 37. 51.

As, if an incumbent be created bishop and holds his church in *commendam*, and another be instituted and inducted; spoliation lies by the one against the other, for the tithes and profits of the church. F. N. B. 36. H.

So, if the incumbent accepts a plurality, and another is afterwards instituted and inducted. F. N. B. 36. H.

So, if a bishop collates to a prebend, and dies, and the prebendary is inducted, and then the king collates another, who is inducted; spoliation lies by one against the other: for the right of patronage is not in debate, the king's clerk not having title till the other be removed by *quare impedit*. F. N. B. 36. K.

So, if a clerk has a church by provision contrary to the st. 25 Ed. 3. upon which the king presents one who takes the profits before induction: for the king's presentee, not being inducted, is a trespasser. F. N. B. 37. C.

So, if one clerk claims the tithes as parson, the other as vicar to the same church, spoliation lies.

If one claims as parson, the other a portion of tithes of the same church due to him by prescription. 1 Leo. 58, 59.

So, spoliation lies by a farmer, &c. of a parson, against another parson, or his farmer.

So, one clerk may have spoliation against the other, if the tithes do not amount to the fourth part of the value of the church, though claimed by several tithes; in which case the right of patronage may come into debate. F. N. B. 37. E.

When spoliation lies, the suit cannot be stayed by prohibition, or *inducavit*. Vide Prohibition, (G 5, &c.)

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And if trespass, or other action at the common law, be sued for such tithes, the other clerk may plead to the jurisdiction of the court.

But spoliation does not lie by one clerk against another, who claims as incumbent of another church.

Or, by the presentation of another patron to the same church. F. N. B. 36. H.

So, if an abbot claims as an appropriation to his house, the other by the presentation of a stranger. F. N. B. 37. B.

Or, by the presentation of the lessee of the same abbot. F. N. B. 37. A.

So, spoliation does not lie against a clerk, who has not a title by the ecclesiastical law : as, if he takes the profits of a church without presentation, institution, and induction. F. N. B. 36. H. l. 37. C. D.

So, it does not lie, where tithes are demanded by a clerk against another claiming by a several title, to the value of the fourth part of the church, or above. Vide F. N. B. 37. E.

(M 2.) By libel. In what cases a suit by libel shall be in the spiritual court.

Remedy for substruction of tithes, in the spiritual court, began originally by act of parliament. 2 Inst. 489. Vide Prohibition, (G 5.)

But it was antiently allowed. 2 Inst. 364. 2 Rol. 217. l. 5. Seld. of tithes, c. 14.

[*]By the st. *circumspecte agatis*, 13 Ed. 1. *si rector petat versus parochianos oblationes aut decimas debitas vel consuetas, vel si rector agat contra rector. de decimis, modo non petatur quarta pars valoris ecclesiæ, habet iudex ecclesiasticus cognoscere.*—And by art. *cleri*, 9 Ed. 2. 1. no prohibition shall go. 2 Inst. 487. 619.

By the st. 1 R. 2. 13. such who by indictment, imprisonment, &c. endeavour to oust the jurisdiction of the spiritual court in such suits, &c. incur the penalty against false appeals.

By the st. 27 H. 8. 20. and 32 H. 8. 7. every subject, &c. shall pay his tithes according to the ecclesiastical laws and custom of the parish ; and for substruction, &c. any person, ecclesiastical or lay, may convent the offender, &c. before the ordinary, &c. and compel him to yield his dues.

By the st. 2 & 3 Ed. 6. 13. if any carry away, &c. his predial tithes before they be set out, on proof before the spiritual judge or other judge, &c. he shall pay double the value besides costs, to be recovered before the ecclesiastical judge, according to the ecclesiastical laws.

And by the provisoes in the st. 32 H. 8. 7. and 2 & 3 Ed. 6. 13. if any substract tithes, &c. he shall be sued in the ecclesiastical court to the intent the ecclesiastical judge may hear and determine the same : and it shall not be lawful for any to sue, &c. before any other judge than the ecclesiastical.

But by a proviso the statutes do not extend to the citizens of London. Vide post, (M 6, 7.)

And by a proviso in the st. 2 & 3 Ed. 6. 13. that act does not extend to give jurisdiction to the ecclesiastical judge to hold plea against the effect of W. 2. 5 art. *cleri. circ. agatis silva cædua*, the treatise *De Regia Prohibitione*, the st. 1 Ed. 3. 10. or in any matter where the king's court ought to have jurisdiction.

And therefore, in all cases of substruction of tithes due, the proprietor, ecclesiastical or lay, may sue for the single value in the ecclesiastical court. 2 Inst. 490. R. 3 Bul. 271.

And for the double value, where predial tithes are detained. Godb. 245.

And shall recover the tithes themselves, as well as the double value and his costs. R. 2 Inst. 612. 615.

A suit may be in the spiritual court, though the tithes are severed and afterwards substracted, &c. by the owner. Cro. El. 843, 4.

Though the actor there claims by a lease of the tithes by parol: for the defendant ought to set forth his tithes. R. 1 Leo. 23.

By the st. 27 H. 8. 20. every defendant to a suit in the ecclesiastical court may have his lawful demand, prosecution, appeal, prohibition, or other lawful defence, or remedy, according to the ecclesiastical laws and statutes of this realm.

(M 3.) By what means payment shall be compelled there.

By the canon Ro. Winchelsey, 1305, *parochiani moneantur 1º, 2º, 3º, ut decimas fideliter solvant; et si non emendaverint, 1º, ab ingressu ecclesie suspendantur; et sic demum ad solvendum per censuram ecclesiasticam, si necesse sit, compellantur.* Vide Cod. Ju. Eccl. 693.

[*](M 4.) When it shall have the aid of justices of peace.

By the st. 27 H. 8. 20. in case the ordinary, &c. for any contempt of the defendant, &c. make information and request to any of the king's council, or to justices of peace where the offender dwells, to assist the ordinary, &c. or reform the defendant in any such cause, such king's council or two justices (*quorum unus*) shall attach such defendant, and commit him to ward without bail, &c. till he find surety before him, or some other counsellor, or justice, by recognizance, &c. to the king, to give obedience to the process, and decree of such ecclesiastical court.

So, by the st. 32 H. 8. 7. if he refuse after sentence, &c. two justices (*quorum unus*) on certificate, or complaint of the ecclesiastical judge may attach and commit to the next gaol, till he find surety, &c. to perform the sentence.

And by the st. 2 & 3 Ed. 6. 13. the ecclesiastical judge, if he obey not the sentence, &c. and no appeal, or prohibition be pending, may excommunicate him; and in case he continues so 40 days after publication of it in the parish church where he dwells, may signify it to the chancery, and pray process of *excommunicato capiendo*.

By the st. 27 H. 8. 20. before sentence, on certificate of contumacy, two justices of peace may commit, &c.—But they cannot proceed upon the st. 32 H. 8. or 2 & 3 Ed. 6. till sentence is passed.

And by these statutes in all suits for tithes, oblations, &c. due by usage where only the single value is demanded, the ordinary may have the aid of justices of peace.

The justices may take surety by recognizance, or obligation to the king.

And upon the st. 32 H. 8. they ought to take two sureties; but upon the st. 27 H. 8. one is sufficient.

But justices of peace cannot commit, &c. except where the defendant is obstinate.

Neither can they commit before sentence, where the suit is by a lay person.

If a commitment be irregularly made, an *habeas corpus* lies. Cart. 221.

[There need be no oath to ground the commitment, the certificate is sufficient. Tithes and other rights good, tithes or other, bad. Certificate

of the vicar-general need not recite that the bishop was out of the diocese, nor need the justices convene the defendant before them. T. 7 G. 3. 4 B. M. 2095.]

• Vide Justices of Peace, (B 34.)

(M 5.) In the temporal courts.—In the hundred or county-court.

Remedy for subtraction of tithes in the temporal courts, may be pursued in the hundred, or county-court, before the mayor of London, in the courts of Westminster, or a court of equity.

Antiently a suit for tithes was allowed in the county-court. Seld. de Dec. c. 14.

In the sheriff's tourn. 2 Inst. 661.

So, in the hundred court.

[*](M 6.) Before the mayor of London. When tithes are paid in London.

By st. 37 H. 8. 12. sect. 2. 11. a decree is confirmed by which it was directed, that the inhabitants of London and liberties shall pay tithes to the parsons, vicars, and curates of the city according to the rate of 16*d. ob.* for every 10*s. per ann.* of all houses, shops, warehouses, cellars, and stables in the city or liberties, and 2*s. 9d.* for every 20*s. rent, &c.* by quarterly payments. Ca. Eq. 192. Seld. 3 vol. 1202.

By s. 3, 4. if by fraud less rent be reserved, and a fine, &c. taken, the tenant shall pay tithes according to the rent when last let, without fraud: and if the owner occupy it himself, he shall pay according to the rent when last let.

By s. 6. if a lessee make an under-lease of part, each shall pay according to his rent.

By s. 13. if he lets it in parcels under 10*s. per ann.* the owner, if he dwells in part of it, or else the principal lessee, shall pay after the rate the house let at; and the tenants of such small parcels shall be discharged, paying 2*d.* a piece for offerings.

So, tithes shall be paid for a house according to the rent upon the former demise, though no rent be reserved, nor fine paid. 2 Inst. 660.

Though the rent be reserved for half a year, and afterwards for another half year.

Though the house was before discharged by the st. 31 H. 8. or otherwise. R. Cro. El. 276. Mo. 912.

But by the same decree, s. 14. no tithes shall be paid for gardens of pleasure, nor let out to profit.

Nor, by s. 16. noblemen's or great men's houses while unlet, if they did not formerly pay tithes.

Nor, by s. 16. for halls of crafts or companies, not using to pay tithes while unlet.

Nor, by s. 17. for sheds, stables, cellars, timber-yards, or tenter-yards, never belonging to a dwelling-house, and not using to pay tithes.

And, by the same decree, s. 18. where less than 2*s. 9d.* for every 20*s.* hath been accustomed, the inhabitants shall pay only the rate accustomed.

—Though the lesser sum was paid by usual agreement, or assent, and not by prescription. R. per three Barons. 12 Geo. 1. Ca. Eq. 193.

Or, by s. 21. if a tenement be let at less by reason of its ruins, the tithes shall be only at the rate it is let at.

And, by s. 12. an householder paying 10s. *per ann.* or more, shall pay nothing for offerings; but his wife, children, servants, &c. shall pay 2d. yearly.

So, by construction upon this statute and decree, if the rent be reserved which was paid at the time of the decree; it shall not be a fraud if the lessee by covenant be bound to pay more annually as a fine. 2 Inst. 659.

So, tithes shall not be paid for an house, which never was demised, but occupied by the owner: for it is *casus omissus*. 2 Inst. 660.

So, an impropiator cannot sue for tithes upon this decree: for he is not within the statute, which names the parson, vicar, and curate only. Hard. 102.

[*]Nor, a sequestrator by ordinance of parliament. Dub. Hard. 102. Cro. Car. 596.

(M 7.) How recovered.

By st. 37 H. 8. 12. s. 19. (which confirms the decree for tithes in London) it is enacted, that if variance arise in the city for nonpayment of tithes, or upon the knowledge of the rent or tithes, &c. on complaint by the party grieved to the mayor, he shall by advice of council call the parties, and make a final end, with costs, &c.

But by the said st. 37 H. 8. 12. s. 20. if the mayor end not the suit in two months after complaint to him, or if any party is aggrieved by him, the chancellor on complaint, shall in three months make an end, with costs, &c.

And therefore, there can be no suit for tithes in London, pursuant to this act, in the ecclesiastical court: for another remedy is expressly appointed. 2 Inst. 660.

And if a suit be for tithes pursuant to this decree, in the ecclesiastical court, a prohibition shall go. Dub. Cro. Car. 596. Acc. 2 Inst. 660.

Yet, there may be a suit for tithes in London, by bill in the exchequer. Vide post, (M 13, &c.)

(M 8.) In the courts of Westminster. By *scire facias* and *mandamus*.

Remedy for tithes in the courts of Westminster was by *scire facias*, *mandamus*, prohibition, *indicavit*, right of advowson, or action.

By the common law, a commission issued out of chancery to inquire by an inquest, whether such a spiritual person had a right to the tithes of such land; and if the inquisition returned that he had, and afterwards another religious body, or ecclesiastical person, took the same tithes after severance, a *scire facias* lay upon this return, to shew cause why he took them; and the defendant pleaded to it, &c. Seld. de Dec. 435. 2 Inst. 640.

So, a *scire facias* lay by a patentee upon a grant to him of tithes by the king. 2 Inst. 640. Seld. de Dec. 441.

And upon a fine executory of tithes. 2 Inst. 640. Seld de Dec. 439.

But a *scire facias* lay only against the pernor of the tithes after severance; not against the owner of the land for his subtraction. 2 Inst. 640.

So, by the st. 18 Ed. 3. 7. (which though it be in the form of a patent, is a statute, 2 Inst. 639.) such writs shall not be granted from henceforth, saving to the king his right, &c.

And therefore, after this statute a *scire facias* does not lie, except in the case of the king and his patentee. 2 Inst. 640.

Though the parties admit the jurisdiction of the court. 2 Inst. 641.

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So, where the king had granted tithes to a church out of his land, &c. a *mandamus* antiently used to be directed to the sheriff, that he should permit the parson, &c. to enjoy them. Seld. de Dec. 445.

And sometimes such *mandamus* seems to be granted, where tithes belonged to a church out of other lands than those of the king. Seld. de Dec. 447. But such writs have been discontinued many years.

[*](M 9.) By prohibition.

So, the party shall have remedy for tithes upon a prohibition in B. R. and C. B. the exchequer, or chancery, where the suit for them is out of the jurisdiction of the ecclesiastical court. Vide Prohibition, (A. 2.—B—G 5, &c.)

As, if a suit be in the spiritual court for tithes of things for which no tithes are payable by law, a prohibition lies.

Of what things no tithes are due, vide ante, (H 14, 15, 16.)

So, by st. 1 R. 2. 13. if parsons, &c. sue in the spiritual courts for tithes, &c. and the judges be indicted, or by forced obligations, &c. be compelled to desist, &c. such obligations shall be null, and the procurers of such indictment shall incur the pain of the st. W. 2. 12. against such as procure false appeals.

(M 10.) By right of advowson and *indicavit*.

As to remedy for tithes by right of advowson, vide Quare Impedit, (B 1, 2.)

If a suit be in the spiritual court by a spiritual person, or his patron, for tithes, against another spiritual person, he or his patron shall have a writ of *indicavit* (which is in the nature of a prohibition) after libel, and before sentence. Cod. Jur. Eccl. 721. F. N. B. 30. E. G. Seld. de Dec. c. 14. s. 3.

Or, after sentence, if there be an appeal from the sentence, 12 Ed. 4. 13, 14.

And it lies, by the common law, where the suit was in the spiritual court for tithes of any value. Seld. de Dec. c. 14. s. 3.

So, where a clerk was impleaded for the advowson itself, or the vicarage, prebend, or chapel, as well as where he was sued in the spiritual court for tithes of an advowson, vicarage, prebend, or chapel. F. N. B. 30. L. 45. B.

So, it lies, where a suit is for oblations, as well as for the advowson, or tithes. F. N. B. 45. D.

So it lies by the king where his clerk is sued, as well as by a common person. F. N. B. 45. B.

And commonly it is between four persons, viz. by one clerk and his patron against another and his patron. F. N. B. 45. B.

If the church be appropriate to an abbot, it may be between three; viz. the abbot who is parson and patron, and the patron and parson of the other church: but there the abbot represents two persons. R. 12 Ed. 4. 13. b.

This writ is in the nature of a prohibition. Vide F. N. B. 30. E. 45. B.

And may be directed to the judge, as well as to the party. F. N. B. 30. E. 45. B.

And the plaintiff who sues an *indicavit*, ought to show a copy of the libel in chancery. F. N. B. 30. G. 45 C. 12 Ed. 4. 13. b.

But by the st. *de circumspecte agatis*, 13 Ed. 1. and by art. cleri, 9 Ed. 2. 2. if a parson demands oblations, or tithes, due, or accustomed, or a parson sues another for tithes, so that the fourth part of the value of the benefice

be not demanded, the spiritual judge shall have conusance, the king's prohibition notwithstanding.

And therefore in the case of a common person, a writ of *indicavit* does not lie if the tithes do not amount to a fourth part of the value of the church. 2 Inst. 364. 12 Ed. 4. 13. b.

[*]So, by the st. W. 2. 13 Ed. 1. 5. the patron of the parson disturbed by *indicavit*, shall have a writ to demand the advowson of the tithes in demand, and when it is deraigned, the plea shall pass in the court christian.

And therefore, though the right of tithes before this statute could not be tried between the parsons after an *indicavit*; now the patron of the parson prohibited may have a writ of right of advowson, and if he recovers, the plea shall be remanded to the court christian. Cod. Jur. Eccl. 721. 2 Inst. 364.

(M 11.) By action. By action upon the st. 2 & 3 Ed. 6. for the treble value.

So, by the st. 2 & 3 Ed. 6. 13. no person shall carry away predial tithes before he hath justly set forth the tithes, or agreed for the same with the parson, &c. or farmer, under pain of the treble value of the tithes carried away. Vide post, (M 18.)

Upon this statute debt lies at common law for the treble value, against him who carries away his tithes without severance from the nine parts, or a composition for them. 2 Inst. 650. Vide Dett, (A 1.)—Pleader, (2 S 14, &c.)

[Evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe, was holden insufficient to defeat an action on this statute. B. R. E. 33 Geo. 3. 5 T. R. 260.]

And it lies by an impropiator or his lessee, though lay, as well as by an ecclesiastical person. Vide 2 Inst. 650.

But an action does not lie for the treble value for any other than predial tithes. 1 Brownl. 31. 2 Inst. 649.

So, an information does not lie by the king, for where the treble value is given as a recompence to the owner, an information does not lie for the king. 2 Inst. 650.

(M 12.) By trespass.

So, where tithes are severed from the nine parts, and afterwards a lay person takes them away, trespass lies. 50 Ed. 3. 20. b.

By the st. art. cl. 9 Ed. 2. 1. if a clerk, &c. sells his tithes, and afterwards demands the money before a spiritual judge, a prohibition lies: for by the sale, the tithes are made chattels.

So, if a parishioner sets forth his tithes, and a stranger takes them, and a libel be against him for it in the spiritual court, a prohibition lies. Mo. 912.

But by the st. 1 R. 2. 14. if a spiritual person be drawn in plea in the secular court, for his tithes taken, by name of goods taken, and he allege the suit is for tithes due to his church; the general averment shall not be taken, without shewing specially how the same was his lay-chattel. Cod. Jur. Eccl. 724, 5.

(M 13.) In a court of equity. In the exchequer.

So, upon a bill in the exchequer by a parson against his parishioner, for discovery and subtraction of tithes, the court decrees the single value, with costs and payment *in futuro*.

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And this did not begin in the time of war ; but was used *ab antiquo*. Hard. 5. 116. Sav. 63. 38 Ass. pl. 20.

[*]And therefore, where the plaintiff demands the single value only, and makes proof of the quantity and value, the tithes shall be decreed. R. Hard. 4, 5.

So, a bill in the exchequer may be for tithes in London upon the decree 37 H. 8. though by the st. 37 H. 8. 12. remedy is given before the mayor. R. Hard. 116.

And as the king himself may sue without question, so his patentee may : for he has the same personal privilege. Hard. 116.

So, a suit may be by will in the exchequer between an impropriator and vicar, for tithes, where the king is patron. Lane, 100. 1 Rol. 538. l. 45. Vide Courts, (D 2.)

So, a bill may be for a discovery only, without paying relief, (in order to sue for the treble value at common law), though he does not offer to take the single value only. Semb. upon Demurrer, Hard. 190.

[On a bill for tithes, defendant may move, that the value be ascertained by the oath of the plaintiff ; and on consent the court will order it, and without consent, will order plaintiff to shew cause why he should not consent. T. 1718, Bunb. 26.]

[If a bill is brought for tithes, glebe and common, the court will retain it till plaintiff makes out his title by an action to the two last. T. 1727, Bunb. 238.]

(M 14.) The bill, when sufficient.

A bill in the exchequer ought to shew how, or by what title the plaintiff demands tithes. Vide Hard. 130. 321. Vide Chancery, (3 C.)

[Lay-impropriator, if he sets out a title under the crown, and derives it down, must prove it ; but if he does not set out such title, it is enough if he proves that the tithes belonged to those under whom he claims. H. 1730, Bunb. 296.]

[A lay-impropriator need not prove payment of tithes to him, if defendant admits his general right, but claims exemption. T. 1730, Bunb. 384.]

[Where there is a lay-impropriator, plaintiff must shew in whom the fee is vested, and derive his title from thence. T. 1722, Bunb. 115.]

[A vicar must shew his endowment of the tithes for depasturing barren cattle, or that they have been usually received by the vicar. T. 1716, Bunb. 7.]

[If a layman claims as lessee of a dean and chapter, it is a sufficient setting forth of title. P. 1723, Bunb. 129.]

[Bill by the bishop and sequestrator, during incapacity of mind of incumbent, is not good, unless the incumbent in person, or by his committee, is a party. M. 1723, Bunb. 141.]

[Bill laying a custom, or some such custom, is bad. H. 1733, Bunb. 333.]

[But if a vicar demands tithes, without saying how entitled, by prescription or endowment, it is well, where the defendant by his answer admits him to be vicar, and does not controvert his right, but insists upon a satisfaction given. R. Hard. 130. P. 1721, Bunb. 72.]

So, if the plaintiff shews, that he is vicar, and entitled generally. R. Hard. 321. though it is there said, that such bill has been held insufficient upon demurrer.

[In bill by vicar for tithe, herbage, and furze, it is sufficient if he shews
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[*]that he was entitled to all small tithes, and one composition for the land in question. H. 1723, Bunb. 144.]

So, it is sufficient, if the plaintiff shews that he is rector, and entitled to the tithes in the parish, without more.

[In equity they never hold the parson to the proof of his admission, institution, induction, and reading the articles. Per totam Curiam, T. 1718, Bunb. 25.]

But if the plaintiff by his bill demands the treble value, his bill shall be dismissed. R. 3 Leo. 204.

So, if he does not make proof of the quantities and values of the tithes, where the defendant insists upon an extinguishment by unity of possession; for no damage to the plaintiff appears. R. Hard. 4.

[In a bill for a portion of great and small tithes in another parish, the vicar of that parish must be a party. T. 1722, Bunb. 115.]

(M 15.) The plea.

The defendant, upon a bill for tithes, may plead non-residence, &c. without shewing quantities and values. R. Ca. Eq. 228. (Vide Com. 392, 3.)

[If bill is brought for tithes, by the lessee of the parson with cure of souls, defendant may plead the non-residence of the parson for 80 days before filing the bill, without setting forth the quantities, &c. for the lease is void. H. 1725. P. 1726. M. 1726, Bunb. 210.]

Sed qu. If rector and lessee join in the bill: for by non-residence, before sentence, he only forfeits his lease and rent, not his tithes. Ibid.]

[If the plea does not shew that the non-residence was not after the time wherein the tithes were demanded, it is bad. Anon. M. 1726, Ibid.]

Or, [defendant may plead] a modus, if he shews quantities and values. Ca. Eq. 228.

[If defendant pleads payment of money in satisfaction, he must shew quantities and values. P. 1720, Bunb. 60.]

But the statute of limitations is no plea. Ca. Eq. 229.

[For defendant is in the nature of a receiver for plaintiff. P. 1726, Bunb. 213.]

[To a bill for tithes, setting forth a former bill in Sc., and a decree for these tithes; after issue to try modus, and a verdict for plaintiff, defendant may plead in bar a subsequent suit in chancery, and issues directed and found for the modus, and decree to establish them. H. 1725. Bunb. 211.]

(M 16.) The answer.

The defendant by his answer ought to answer all the material parts of the bill.

If he insist by his answer (and not by plea) upon a discharge by a modus, he ought to answer to quantities and values; and an examination upon interrogatories, if the modus be proved, does not excuse from a full answer. R. Hard. 130. (Vide Com. 392.)

So, if he insists upon a modus, by plea: for the plea does not go to the right of the plaintiff, but to avoid the account by the defendant. Semb. cont. Hard. 130.

Yet it is sufficient by answer to say, that the lands belonged to such[*] an abbey, &c. which was of such an order, and therefore by stat. 31 H. 8. ought to be discharged, without more certainty. R. Hard. 322.

[If defendant answers, that the manor was part of the possessions of the
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priors of St. John of Jerusalem, it is a good discharge. P. 1726, Bunb. 214.]

[It is not sufficient to say the lands were formerly in the hands of the abbot of A., one of the greater monasteries dissolved by 31 H. 8., it must say they were discharged in his hands. H 1718, Bunb. 37.]

[It is sufficient, if it says that the lands where, &c. were part of the bishop's palace, and therefore exempt; though he does not lay it personally in the bishop, because the exemption goes with the lands; though it would be better to lay it by prescription. As to lands belonging to monasteries they must set out how the prescription is. T. 1718, Bunb. 26.]

So, if a demand be of tithes by custom of things, for which none are due *de jure*, he need not answer to quantities or values, if he denies the custom; for it is sufficient that he be examined upon interrogatories when the custom is tried. R. Hard. 188.

[It is sufficient to set forth what titheable matters he has, and to say he had no other titheable matters whatever. P. 1722, Bunb. 108.]

[On a bill for tithe wood, if defendant insists it was timber, the court will presume it was above twenty years growth, unless plaintiff prove the contrary. M. 1723, Bunb. 138.]

So, by bill in chancery. Vide Chancery, (3 C.)

(M 17.) In chancery.

[By st. 7 & 8 W. 3. c. 34. s. 4. where any quaker shall refuse to pay or compound for his great or small tithes, or to pay any church rates, the two next justices of peace of the same county, neither of whom is patron of the church or chapel, from whence the said tithes arise, nor any ways interested in the said tithes, on complaint of any parson, &c. by warrant under their hands and seals, may convene before them such quaker, and examine upon oath, or in such manner as by this act is provided, the truth of the complaint, and ascertain and state what is due and payable by such quaker to the party complaining, and by order under their hands and seals direct the payment thereof, so as the sum ordered do not exceed 10*l.*; and on refusal, any one of the said justices, by warrant under his hand and seal, may levy the money ordered, by distress; any person aggrieved may appeal to the next general quarter sessions for the county, &c. who may reverse or confirm the order; and no proceedings under this act shall be removed by certiorari, &c. unless the title of such tithes shall be in question.]

[But this act being temporary and relating only to great and small tithes and church rates, it was by st. 1 G. 1. st. 2. c. 6. s. 2. made perpetual, and extended to any tithes or rates, or any customary or other rates, dues, or payments, belonging to any church or chapel, which of right by law or custom ought to be paid for the stipend or maintenance of any minister or curate officiating in any church or chapel.]

[Under these acts, the mere circumstance of the quakers' controverting the title, and asserting that the title was in question, without shewing on what principle they dispute the title, is not sufficient to found an application for a *certiorari*. 1 Bur. 488.]

[*] (M 18.) The remedy upon a disseisin of tithes.

By st. 32 H. 8. 7. if any having an inheritance, freehold, term, or interest in a parsonage, vicarage, portion, tithes, &c. or other ecclesiastical profit, which be or shall be made temporal, or in temporal hands, be disseised,

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&c. he may have remedy in the temporal courts by *præcipe quod reddat*, assise, *mort d' ancestor*, *quod ei deforcat*, dower, or other writ original, &c. in like manner as of other lands or tenements.

By the st. 27 H. 8. 28. 31 H. 8. 13. 37 H. 8. 4. and 1 & 2 Ed. 6. 14. for the dissolution of houses of religion, and this act of 32 H. 8. 7. and the st. 1 & 2 Ph. & M. 8. tithes and other ecclesiastical duties, which come to the king, are temporal inheritances, and have all the incidents of other inheritances. Co. L. 159. a. Vide Advowson, (E).

And therefore, shall be assets in the hands of an heir, or executor. Co. L. 159. a.

A wife shall have dower of them. Co. L. 159. a.

And a husband be tenant by the curtesy. Co. L. 159. a.

So, the same actions and remedy shall be allowed for them as for other estates.

An ejectment lies for tithes. Cro. Car. 301. R. Jon. 322.

So, tithes or a rectory impropriate, being lay-fee, cannot be sequestered in the spiritual court, for not repairing the chancel, &c. Semb. 2 Vent. 35.

[Tithes have every property of an inheritance in land, except that they lie in grant and not in livery : and therefore, if lessee of tithes covenant for him and his assigns, that he will not let any of the farmers in the parish have any part of the tithes ; this covenant runs with the tithes, and binds the assignee, against whom the action is brought, for breach of covenant. 3 Wils. 25. 30.]

(N) ASSURANCE OF TITHES.

By the st. 32 H. 8. 7. writs of covenant, and all other writs for fines, and all other assurances, shall be devised and granted in chancery, of parsonages, vicarages, tithes, &c. as are used of other lands ; and shall be of like force.

DISPENSATION.

Vide CONDITION, (P).—COPYHOLD, (M 8.)—FORFEITURE, A 11, 12.)
—PREROGATIVE, (D 4, &c. 18, &c.)

DISPOSITION.

DISPOSITION BY A WIFE. Vide BARON AND FEME, (P 1. 3.)—CHANCERY, (2 M 14, 15.)

[*]DISSEISIN.

Vide ABATEMENT, (H 47.)—DISMES, (M 18.)—GARRANTY, (I 1.)—RENT, (D 2.)—SEISIN, (F 1, &c.)

NOVEL DISSEISIN. Vide ASSISE, (B 1, &c.)

RE-DISSEISIN AND POST-DISSEISIN. Vide ASSISE, (F 1, &c.)

DISSOLUTION.

DISSOLUTION OF A CORPORATION. Vide FRANCHISES, (G 4, &c.)

— OF HOSPITALS. Vide HOSPITAL, (B—C.)

DISSOLUTION OF MONASTERIES. Vide **DISMES**, (C 5.—E 7.)—**MONASTERY.**

_____ **OF MARRIAGE.** Vide **PARLIAMENT**, (H 3.)

_____ **OF PARLIAMENT.** Vide **PARLIAMENT**, (P 1, 2.)

DISTRESS.

(A) DISTRESS.

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[*](A) DISTRESS.

(A 1.) When it may be taken.

For all services a distress may be made of common right. Doct. & St. l. 2. c. 9. Co. L. 150. b.

As, for rent-service. 45 Ed. 3. 15. b. 1 Rol. 665. l. 37. Co. L. 142. a.

So, for heriot-service. 1 Rol. 665. l. 47. Vide Copyhold, (K 21.)

So, for suit-service: as, suit to a hundred-court, or court-baron. 1 Rol. 665. l. 40. Vide Copyhold, (K 17.)

So, for a fine assessed in a court, a distress is due of common right. 1 Rol. 666. l. 4. R. 8 Co. 41. b.

So, for an amerciament in a court-leet, for an offence in or out of court. D. Kel. 66. b. 1 Rol. 665. F. R. 8 Co. 41. Sav. 94. R. cont. that there ought to be a custom alleged for distraining. 1 Sal. 175. R. acc. 9 H. 7. 21. b. D. that in the case of a common person there ought to be a custom alleged; otherwise in a leet of the king. Cro. El. 748. Vide Leet, (O 10.)

So, a distress might be for aid *pur faire filz chivaler, ou file marrier*.
1 Rol. 665. l. 42.

So, for a relief the lord himself may distrain. 1 Rol. 665. l. 45.

Or, *pro valore maritagii*. D. Cro. Car. 533.

So, for trespass with cattle, a distress may be of the cattle damage-fessant.

[A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. B. R. M. 38 Geo. 3. 7 T. R. 431.]

And a bailiff, by his office, may distrain without a special warrant. Dub. Cro. El. 698. Vide Cro. El. 748.

But for a thing due against common right, a distress cannot be made without a prescription : as, *pro certo letæ*, he ought to prescribe to distrain for it, as well as to have it. R. 11 Co. 44. b.

So, for an amerciament in a court-baron. D. 11 Co. 45. a. Doct. & St. l. 2. c. 9. 1 Rol. 666. l. 6.

So, for toll in a fair. 1 Rol. 666. l. 10. 15. Hob. 187.

[But a distress cannot be made for the toll of goods fraudulently sold out of the market, to avoid the toll : but the party injured must bring a special action on the case. Cowp. 661.]

So, for a tax chargeable by custom in a vill, &c. for the repair of a bridge. 1 Rol. 666. l. 20.

So, for land-cheap, or the like customary payment within a vill, &c.

So, for the profits of a court-baron reserved to the lord upon the grant of a manor. R. Mo. 870.

So, for a fine granted *pro licentia concordandi*. Semb. 1 Leo. 249.

So, for the cattle of the lord where the tenants have the sole pasture. Semb. 2 Cro. 208.

So, for a fine assessed in a leet by custom for refusing to be sworn constable. R. Skin. 636.

So, for a relief upon an alienation, where due only by custom, and not by tenure, or reservation. Jon. 133.

So, for debt, account, or contract, &c. a distress cannot be taken. Doct. & St. l. 2. c. 9.

[*]Nor, for waste, reparation, &c. Doct. & St. l. 2. c. 9.

So, for a service wholly uncertain, a distress cannot be taken ; as, for service in *frankalmoigne*. Co. L. 96. a.

So, a man cannot take two distresses for the same rent : for it was his folly that he did not take sufficient at first. R. Mo. 7. Cro. El. 13. R. Lut. 1536.

Though he alleges that his first distress was but of such a value, and that it was not sufficient. Dub. Cro. El. 13. Q. Lut. 1536. [Vide 1 Burr. 579, *et seq.*]

But for rent due at several days, he may take several distresses ; though the whole was due at first. Mo. 7.

[It may be taken for rent under a lease, though the tenant entered before the commencement of it. P. 9 G. Str. 550.]

[A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. Doug. 279.]

[An annuitant may distrain for arrears, though a term be vested in himself to secure the payment, the reversioner (in possession) being considered as his under-tenant. 2 Blk. 1326.]

[If a lessee assigns or surrenders his entire estate, reserving a rent, no distress can be taken for it. 2 Wils. 375. Since, having no reversion, if the transaction be without deed, the sum reserved is in gross; if by deed, a power of distress should be annexed, the rent being seck and not service. Quære, in this latter case, whether he may not distrain under stat. 4 Geo. 2. c. 28. s. 5., which authorizes a distress for rents seck, rents of assize, and chief rents, the same as for rents service.]

[A termor, after his term expired, and demand of possession by his lessor, cannot distrain on his under-tenant continuing in possession. 4 Taunt. 720.]

[Distress is not incident to a fee-farm rent as such, unless the case is brought within 4 Geo. 2. c. 28. s. 5. Dougl. 624.]

[Where a party is in possession of premises under an agreement for a lease, and no other circumstances exist whence an implied tenancy can be raised, since no rent is due for the occupation, but only, if any, a compensation in nature of rent, the owner cannot distrain for nonpayment. 2 Taunt. 148.]

[Since a landlord has a right to take possession of the premises, at the expiration of the term, without bringing an ejectment, the tenant holding over cannot distrain his cattle damage-feasant put upon the premises by way of taking possession. 7 T. R. 431.]

[Semble, that the owner of the land may distrain tithes as damage-feasant, after a reasonable time. Wightw. 113.]

[If two persons have distinct rights in the same close, and the cattle of one, in the fair exercise of his right, injure that of the other, his remedy, if any, is by action, not distress. 1 Taunt. 529.]

{ When, on a lease, rent is made payable in repairs, being for a sum certain, distress may be made. *Smith v. Colton*, 10 Johns. Rep. 91.

Distress for rent will not lie, unless there be an agreement for a sum certain either in writing or by parol. *Jacks v. Smith*, 1 Bay, 310. *Smith v. The Sheriff of Charlestown District*, 1 Bay, 438.

The right to distrain is not extinguished by an unsatisfied judgment for rent. *Chipman v. Martin*, 13 Johns. Rep. 240.

Nor by the acceptance of an order which is dishonoured. *Printerns v. Helfried*, 1 Nott & M'Cord, 187. }

(A 2.) At what time.

A distress for damage-feasant may be in the night: otherwise the cattle may escape. Co. L. 142. a. Vide Doct. & St. l. 2. c. 9.

But for a rent-service or a rent-charge a distress cannot be in the night. Co. L. 142. a.

A distress for rent cannot be made upon the day in which the rent is [*]payable: for it cannot be due till the last moment of the day. Doct. & St. l. 2. c. 9. Co. L. 47. b. [See st. 8 Ann. c. 14. s. 6, 7.] { *Gano v. Hart*, Hardin, 297. }

So, it cannot be after the term ended. 1 Rol. 672. l. 15. Doct. & St. l. 2. c. 9. Co. L. 47. b. [B. R. M. 27 G. 3. 1 T. R. 441.]

Though the lessee continues in possession by sufferance, or by wrong, after his lease expired: for he is not in, in privity of the lease. Cont. Kel. 96. a. R. acc. 1 Rol. 672. l. 20.

So, a distress cannot be for rent after his estate is determined: as, if a man seised of a rent-charge, or rent-service, in fee, or for life, grants over his estate, he cannot distrain for arrears due before his grant. 4 Co. 50. b. Ognel. 1 Rol. 672. l. 30. Co. L. 162. b. Vide Dett, (B.)

So, if a grantee of a rent for years, if he so long live, dies, his executor or administrator cannot distrain for the arrears by the common law, nor by the st. 32 H. 8. 37. Cro. Car. 471.

So, if a man seised in fee, tail, or for life, of a rent, or fee-farm, dies, his executor or heir cannot distrain by common law for the arrears incurred in his lifetime. Co. L. 162.

Nor, since st. 32 H. 8. for relief, aids, or corporal service. Co. L. 162. b.

Nor for a *nomine pænæ*. Co. L. 162. b.

Yet, if a lessee for twenty years leases for ten years, and dies, his executor or administrator may distrain for arrears incurred in his lifetime : for the executor represents his testator, and has the reversion and rent annexed, in the same plight as his testator had it. R. 1 Rol. 672. l. 35.

So, if a lease be *de anno in annum quamdiu*, &c. and after a subsequent year commenced the lessee dies ; the lessor may distrain upon the executor or administrator : for the lease continues till the end of the year. R. Sal. 414. (Vide Lut. 214.)

[Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it ; a distress may be taken for rent due for the whole term. C. P. T. 30 Geo. 3. 1 H. Bl. 465.]

And now, by the st. 32 H. 8. 37. an executor or administrator of any seised of rent-service, charge, or seck, or of fee-farm in fee, tail, or for life, may have debt, or distrain for arrears due in the life of the testator, or intestate.

[The executor of a tenant for his own life may distrain under this statute. Ld. R. 172.]

And an husband seised in right of his wife, may do so for arrears incurred in her life, before or after coverture. Sect. 3.

So may tenant *pur auter vie*, his executors and administrators, for arrears incurred during the life of *cestuy que vie*. Sect. 4.

And all rents in money, or in corn, cattle, pepper, &c. are within the statute. Co. L. 162. b.

So, a distress may be upon the land so long as it is in possession of him that ought to pay, or any claiming by, from, or under him. R. 4 Co. 50.

So, by the st. 8 Ann. 14. a lessor may distrain in six calendar months after a lease for life, for years, or at will is determined : so as the lessor's title or interest, and the possession of the tenant from whom the rent became due, be continuing.

[*][Where a part of the tenant's corn remained in a barn on the demised premises, beyond six calendar months after the determination of the term, but within the term allowed by the custom of the country, for the out-going tenant to get in and dispose of his crop ; held, that the corn might be distrained by the landlord for rent *arrere*. 1 H. B. 5. Id. 7.]

[An agreement that rent may be distrained for before it becomes due is valid. 2 T. R. 600.]

(A 3.) In what place.

A man may distrain for a rent-service in any part of the land holden.

So, for a rent charged, or reserved upon a lease, upon any part of the land out of which the rent issues.

And if a house be upon the land demised or charged, a distress may be in the house, when the house is open.

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So, a distress may be in a house through the doors or windows. 1 Rol. 671. l. 7. 17.

If the land lies in two counties, a distress may be for the whole rent in either county. 1 Rol. 671. l. 30.

So, if it be in the hands of many tenants, it may be for the whole in the land of any tenant. 1 Rol. 671. l. 35.

[But if two parcels of land are let by the same lessor to the same lessee by separate demises, and rent due on both, there cannot be a joint distress for both. P. 9 G. 2. Str. 1040. B. R. H. 245.]

So, if cattle are driven to avoid the distress when the lord, &c. is in view, they may be pursued freshly, and taken in land out of his fee, or the land holden. 1 Rol. 671. l. 40. Co. L. 161. a.

So, by the st. 8 Ann. 14. if a lessee clandestinely carry off goods from the demised premises to prevent a distress, the lessor, or any empowered by him, may in five days after carrying off, take such goods, wherever found, for the rent-arrear, and sell or dispose the same, as if distrained on the premises: provided the lessor may not seize as a distress goods sold *bona fide*, and for a valuable consideration before such seizure made. { Vide Mosby v. Leeds, 3 Call, 439. }

[By the st. 11 G. 2. 19. within thirty days. And the lessor may break open an house to seize them in the day-time. And may distrain stock or cattle and crops growing on the premises. Vide this statute. 2 Gab. 7.]

So, the king may distrain for a rent-service in all the lands of his tenant held of him, or of others. 1 Rol. 670. l. 15. 2 Inst. 131.

And if the lessee makes an under-lease after the arrears incurred, the king may distrain in all the lands of the under tenant for the arrears. R. 1 Rol. 670. l. 25. 1 Rol. 159. l. 45.

So, by st. 22 Car. 2, 6. a purchaser of a fee-farm-rent shall have the same remedy as the king might have, by distress, upon all the lands of the terre-tenant. 2 Ver. 714.

Yet the king cannot distrain in lands of his tenant which are not in his actual possession, and manured with his own cattle: as, in lands of the tenant, demised for life, for years, or at will. 2 Inst. 132. 2 Ver. 714.

So, if a demise be of a manor, &c. to which an advowson belongs, a distress for rent cannot be in the glebe of the advowson. 1 Rol. 671. l. 22. 35.

[*]So, a man may distrain for an amerciamment in the sheriff's turn, in any lands of the party within the county; for it is personal. 1 Rol. 670. l. 30.

And for an amerciamment in a hundred or leet, within the whole hundred or leet. 1 Rol. 670. l. 35. 40.

Yet a distress cannot be for an amerciamment in a leet, &c. upon land in the king's possession within the precinct of the leet: for during the king's possession it is out of the jurisdiction. 1 Rol. 670. l. 50.

But by the st. of Marl. 52 H. 3. 15. *nulli liceat ex quacunque causa distractionem facere extra feodum suum, nisi domino regi et ministris suis, &c.*

And this was but an affirmance of the common law. 2 Inst. 131.

Wherefore none can distrain out of the lands holden, or out of those from which the rent issues. 1 Rol. 671. l. 10. 12.

And though cattle escape out of the fee when they are in view, the lord cannot distrain them. 2 Inst. 131. Co. L. 161. a.

Or, if they be driven out for any lawful cause, except for avoiding the distress. 1 Rol. 671. l. 45. Co. L. 161.

So, if they be driven by the tenant before the view of the lord, though it be for avoiding the distress. Co. L. 161. a.

So, if cattle damage-tenant are driven out of the land after view, they cannot be distrained. Co. L. 161. a.

If a man distrains out of his fee, trespass lies. 2 Inst. 131.

Or, an action upon the st. of Marl. 2 Inst. 131.

So, by the st. of Marl. 15. none can distrain in *via regia*, or *communi strata*,

Though it be within his fee.

If a man distrains in the highway, an action lies upon the st. of Marl. 2 Inst. 131.

But a man shall not avoid the distress, in replevin: for it is not void. 2 Inst. 131.

But the king may distrain in the highway.

So, a distress for an amercement may be in the highway. 2 Rol. 670. l. 44.

So, for toll thorough, &c.

So, for a rent-charge, if it be parcel of the thing out of which the rent issues: for the st. of Marl. extends only to a distress to rents and services. 2 Inst. 131. R. Cro. El. 710.

[Distress for rent service may be upon common appendant or appurtenant. 11 G. 2. c. 19. s. 8.]

[Where distress made for rent due not exceeding 20l. 3. V. 529. (D 9.) costs and charges limited by schedule. 57 G. 3. c. 93. s. 1.]

[Treble damages and full costs to be awarded in case of extortion, upon conviction before a justice of peace of the county, &c. Id. s. 2.]

[How levied or enforced. Ibid.]

[Justices empowered to summon and examine witnesses and enforce obedience. Id. s. 3.]

[Justice may award 20s. for costs to the party complained against, if complaint unfounded, Id. s. 4.—Landlord not prejudiced unless he personally acts. Ibid.]

[Saving for other remedies to party aggrieved, unless complaint preferred under this act. Ibid.]

[*][Order of justices to be in the forms prescribed by schedule. Id. s. 5.]

[Brokers, &c. levying distress to give copies of their charges, though rent demanded exceed 20l. Id. s. 6.]

[Printed copy of this act to be hung up in sessions houses of England and Wales. Id. s. 7.]

[Form of order where judgment for complainant. Ibid.]

[Form of order where complaint dismissed. Ibid.]

(B) WHAT THINGS MAY BE DISTRAINED.

(B 1.) For rent-service.

Generally, all moveable goods, and chattels of the lessee may be distrained for rent due, if they are found upon the land demised.

So, moveable goods and chattels of the tenant, for services due to his lord. And of the terre-tenant, for a rent-charge.

So, cattle of a stranger, which are put or escape into the land out of which the rent issues, may be distrained for such rent. 11 H. 7. 4. a. 15 H. 7. 17. b. R. 2 Sand. 289. 1 Rol. 668. l. 5—30. 671. O. Vide infra.

[The cattle of a stranger may be distrained even for a modern rent-service the instant they come upon the premises, liable to the distress, if they came there either by the default of the owner. Id. R. 167, 168, 169.

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[Or, with his consent. Ld. R. 167. in marg.]

[But, if through the default of the tenant, not until after they have been *levant et couchant*. D. Ld. R. 167, 168, 169.]

[And the laudlord has given the owner notice where they are. D. Ld. R. 169.]

[For the services however of an antient seignory, the lord may distrain the cattle of a stranger the instant they get upon the premises, though they escaped thither by the default of the tenant of those premises. D. Ld. R. 168.]

Though they never were *levant* and *couchant* upon the land. 15 H. 7. 17. b. R. 2 Sand. 289. Co. L. 47. b.

Though the escape was for default of the fences of the same land. R. 2 Sand. 289. R. Pal. 43. 2 Rol. 124.

And though the fences ought to be repaired by the lessor himself, or his tenant. Semb. 2 Sand. 289. But Sanders doubted of it. Dub. per Holt, Mod. Ca. 198.

So, if cattle driven to London are depastured by the way, they may be distrained for the rent of the land where they are depastured. R. 2 Vent. 50. 3 Lev. 261.

Though put there with the assent of the lessor. R. 2 Vent. 50. 3 Lev. 261.

Though it was a common inn at which the cattle were depastured. Qu. 2 Vent. 50. And the party was relieved upon this in equity. 2 Ver. 130. Pr. Ch. 7.

But if cattle, going to market, are depastured by the way, in land belonging to a common inn, they cannot be distrained for the rent of the land. Not R. 3 Lev. 260. But said, that they are not privileged though going to market. 2 Vent. 50. [4 T. R. 567.]

[*]So, if A., tenant in common with B. and C., leases his third part, the cattle of B. or C., or any depasturing by their licence, cannot be taken for rent by A. R. 2 Vent. 228. 283.

So, if cattle escape into the close of B. and are freshly pursued, they cannot be taken for rent of the close. R. 1 Brownl. 170.

So, if cattle which escape be distrained for a long arrear of rent, the owner shall be aided in equity. 2 Ver. 131. Pr. Ch. 8.

[Where a house is let ready furnished, a distress may be made for the whole rent reserved, because in point of law, the rent issues wholly out of the realty. 2 N. R. 224.]

[An avowant in replevin, may distrain the goods anew for another demand pending a judgment. 1 Taunt. 218.]

[If the sale under an execution is fraudulent, and the property is not removed, it may be distrained for rent. 3 Taunt 400.]

[Where a tenant dies, and his goods remain upon the premises, they may be taken for arrears of rent accrued before or after the decease. 1 H. B. 465.]

[A carriage standing at livery may be restrained for rent. 3 Burr. 1498. 1 Blk. 483.]

(B 2.) For a rent-charge.

But for a rent-charge, generally, the cattle or goods of a stranger cannot be distrained. Dub. 15 H. 7. 17. b. Cont. 1 Rol. 669. l. 25. Qu. 1 Rol. 668. l. 13. R. acc. 1 Rol. 672. l. 12.

So, if one joint tenant grants a rent-charge, the cattle of his companion cannot be distrained. 1 Rol. 669. l. 20.

So, if a man makes a lease, and afterwards grants a rent-charge out of the land, the cattle of the lessee are not distrainable: for he claims paramount the charge. 1 Rol. 669. l. 45.

So, if a rent-charge be granted out of a manor, the cattle of the copyholders are not distrainable. R. 1 Rol. 669. l. 52.

Or, if a rent-charge be claimed out of a manor, by prescription. Dub. 1 Rol. 669. l. 50.

Yet where a stranger claims under the grantor after the grant of a rent-charge, his cattle are liable to distress: as, the cattle of a lessee, where the demise was after the grant.

So, if a joint tenant grants a rent, and afterwards leases to his companion for years, his cattle are distrainable. 1 Rol. 669. l. 30. 40.

So, if part of the land charged comes to a tenant in common of another part of the same land. R. Hob. 80. 1 Rol. 670. l. 5.

(B 3.) For an amerciament, &c.

So, the cattle, or goods, of a stranger cannot be distrained for an amerciament, &c. Cont. 1 Rol. 669. l. 7. Acc. F. N. B. 100. H.

Vide ante, (A 1, 3.)—Leet, (O 10.)

(B 4.) For damage-feasant.

But all chattels trespassing upon land may be distrained damage-feasant.

[A distress damage-feasant is a summary execution in the first instance; the distrainer must take care to be formally right. He must seize the cattle in the act, upon the spot; for if they escape, or are driven out of the land, though after view, he cannot distrain them; he [*] must observe a number of rules, in relation to the impounding and manner of treating the distress. Per *Ld. Mansfield C. J.* B. R. H. 16 Geo. 3. Cowp. 417.]

The cattle of A. may be distrained damage-feasant, though put there by a stranger, without his privity. R. 1 Rol. 665. D.

So, ferrets, grayhounds, &c. which chase conies in a warren, may be distrained damage-feasant. 1 Rol. 664. l. 40, 41.

But a horse upon which a man rides upon the corn of another, cannot be taken damage-feasant. 1 Rol. 664. l. 45. [B. R. H. 35 Geo. 3. 6 T. R. 138.] Cont. per Ch. Justice, 1 Sid. 440.

Nor, a net, which a man carries in his hand upon my land. 1 Rol. 664. l. 43.

(C) WHAT NOT.

But for a rent-service, &c. things fixed to the freehold cannot be distrained: as, the doors or windows of a house. Co. L. 47. b. 14 H. 8. 25. b. Vide ante, (A 1, &c. B 1, &c.)

Furnaces, cauldrons, &c. fastened to the house. Co. L. 47. b.

[Neither can a limekiln if affixed to the freehold. B. R. H. 32 Geo. 3. 4 T. R. 504.]

Nor corn growing upon the land. 1 Rol. 666. l. 47. [Now allowed by the st. 11 G. 2. 19. *quod vide.*]

Nor a millstone fixed to a mill. 14 H. 8. 25. b.

Though it be removed to be picked for the use of the mill. 14 H. 8. 25. b.

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Otherwise, if wholly severed, and removed from the mill. 14 H. 8. 25. b.
 So, things of which no one has a valuable property, cannot be distrained :
 as, things *feræ naturæ*, deer, conies, &c. in a park or warren. Co. L. 47. a.
 [Deer in an inclosed ground may be distrained for rent. C. P. H. 11
 Geo. 2. Willes, 46.]

Nor, poultry, fish, &c. 2 Inst. 133.

Nor, a dog. Co. L. 47. a. [Willes, 46. contra.]

Nor, utensils of trade, or things used in trade ; for it is for the public good
 that trade be encouraged ; and therefore, the books of a scholar shall not be
 distrained. Co. L. 47. a.

Nor, the axe, or other instruments of a carpenter, &c. Co. L. 47. a.

Nor, an anvil in a smith's shop. 14 H. 8. 25. b.

Nor, a millstone in a mill. 14 H. 8. 25. b.

Though the anvil be removed out of the stock, or the millstone out of the
 mill to be picked. R. 14 H. 8. 25. b.

So, by the st. 51 H. 3. *de districtione Scaccarii*, beasts of the plough, or
 which improve the land, as sheep, &c. shall not be distrained, if there be
 other sufficient distress : which was an affirmance of the common law. 2
 Inst. 132. Co. L. 47. a.

Nor, a saddle-horse. 2 Inst. 133. 1 Rol. 667. l. 35.

Nor, armour, Jewels, apparel, &c. 2 Inst. 132.

So, an horse in a smith's shop shall not be distrained for the rent of the
 shop. Co. L. 47. a.

Nor, an horse in an hostry. Co. L. 47. a.

Nor, cloth, or garments in a tailor's shop. Co. L. 47. a.

[*]Nor, materials for cloth in a weaver's shop. Co. L. 47. a. R. Cro.
 El. 550. 596.

Nor, corn or meal sent to the mill, or market. Co. L. 47. a.

Though the cloth, &c. be many days at the shop. Per Brian, 22 Ed. 4.
 49. b. 1 Rol. 668. l. 35. 40.

Nor, any goods delivered to any person in the way of his trade. 1 Sal.
 250.

Or, delivered to any one to be carried for hire : for he is a common car-
 rier as to them. R. 1 Sal. 250.

Yet beasts of the plough may be distrained, if there be no other distress.
 P. Ld. K. 4 T. R. 567. P. Grose, *ibid.* 569.

And instruments of trade, if they are unnecessary. 1 Sal. 249.

[Or, if they are not in actual use at the time of the distress, or if there be
 no other sufficient distress on the premises. C. P. M. 18 Geo. 2. Willes,
 512. B. R. H. 32 Geo. 3. 4 T. R. 565.]

So, a ship, sails, or tackle, for a duty which arises from the ship : as, for
 toll for goods laden upon the ship. R. 1 Sal. 249.

So, utensils of trade, &c. can be taken for a distress in the nature of an
 execution : as, for a rate to the poor. Per Sand. Ob. on st. 22 Car. 2. Ch.
 1. p. 39.

[See this distinction between a distress for rent, &c. and a distress in the
 nature of an execution, very fully investigated in 1 Bur. 579, & seq.]

So, an horse in a cart loaden with corn. R. 1 Sid. 422. 440.

[A race-horse standing in a stable, half a mile from the inn, may be dis-
 trained. Barnes, 472.]

[A chariot standing at a livery-stable may be distrained. T. 4 G. 3. 8
 B. M. 1498. 1 Bl. Rep. 483.]

So, goods shall be privileged from distress, when they are in use : as, an axe, &c. with which a man is cutting wood. Co. L. 47. a.

An horse on which a man is riding. Co. L. 47. a. 1 Sid. 440. [6 T. R. 138.]

So, if a man in a journey, by sickness, stays two or three weeks, his horse shall be privileged. 1 Rol. 668. l. 5.

So, if an horse goes with corn to a mill, and is at the house of the mill till the corn be ground. R. Cro. El. 550.

Or, during that time he be put into the stable. Per two J. Warburton cont. Cro. El. 550.

So, if an horse goes with yarn, &c. to a weaver, &c. or fetches yarn thence, and carries it to a private house to be weighed, and is hung there till the yarn be weighed. R. Cro. El. 550. 596.

So, if goods delivered to a carrier be put into a waggon in a private barn. R. 1 Sal. 250.

Yet for a rent-charge, horses in a cart loaden with corn upon the land, may be distrained. R. 1 Sid. 422. 440. 1 Vent. 36.

Though a man be upon the cart. Qu. 1 Sid. 440.

So, things shall not be distrained which cannot be known to be replevied, or to be restored in the same plight : as, money out of a bag, 1 Rol. 666. l. 51.

Meal or grain out of a bag. Vide 1 Rol. 667. l. 4. 6.

Nor, corn in shocks or straw ; nor, hay in a barn. 1 Rol. 666. l. 53. 667. l. 16. R. 2 Mod. 61. R. Jon. 197.

[*][Sheaves of corn cannot be distrained for arrears of an annuity, but sheaves in a cart may ; and *carectat. triciti in garbis*, shall be understood a cart loaded with sheaves. T. 4 G. 2. C. B. Fort. 361.]

But now, by the st. 2 W. & M. 5. any person, having rent-arrear on a demise, may seize sheaves or shocks of corn, or corn in the straw, or loose, or hay in a barn, granary, or upon a hovel, stack, or rick, otherwise, upon any part of the land charged with such rent ; and lock up and detain the same in the place where found, &c. so as such corn be not removed to the prejudice of the owner, &c. till replevied or sold.

And before this statute, waggons or carts with corn might be distrained for rent : for they might be safely restored. Co. L. 47. a. Jon. 197.

So now, corn may be distrained, be it threshed or not threshed. R. Lut. 214.

[Vide st. 11 G. 2. 19.]

[Corn sown by a tenant at will, (who died before harvest), and purchased by another person, cannot be distrained for rent due from a subsequent tenant. C. P. T. 10 & 11 Geo. 2. Willes, 131. 7 Mod. 251. S. C.]

[Qu. Can goods taken in execution be distrained for rent ? Ibid.]

[Nothing can be distrained which is in the custody of the law. D. Gilb. 44.]

[Thus goods cannot be distrained which are in pound for damage fea-sance. Ibid. Semb. 9. Vin. 141. pl. 47.]

[Or, which are in the hands of the sheriff under a *feri facias*. Ibid. Semb. 1 Atk. 104.]

[Or, which have been seised by process at the suit of the king. D. Gilb. 44.]

[Or, which have been taken under an attachment. D. 1 Vent. 221.]

[Or, sold under a *feri facias*, under such circumstances that it has not been proper since to remove them. R. 3 F. 114.]

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[Thus where a tenant's corn while growing was seized and sold under a *fi. fa.* and the vendee permitted it to remain while it was ripe, and then cut it, after which, and before it was fit to be carried, the landlord distrained it for rent; the courts of C. B. and B. R. held it was not distrainable. 3 F. 114.]

[Implements of trade are only privileged from distress where there is not a sufficient distress without them, or where they are in actual use. 4 T. R. 565. Id. 568.]

{ Goods sent to a publick auction store, cannot be distrained for rent due by the auctioneer. *Himely v. Wyatt*, 1 Bay, 100.

Nor a negro boy bound out as an apprentice. *Praelon v. M'Bride*, 1 Bay, 167.

Nor a negro slave of a third person, accidentally found on the premises. *Bull v. Horlbeck*, 1 Bay, 297. Vide *Adams v. La Comb*, 1 Dall. 440.

It seems, that by statute, cooking utensils cannot be distrained. *Van Sickler v. Jacobs*, 14 Johns. Rep. 434. }

(D) HOW A DISTRESS SHALL BE TREATED.

(D 1.) It shall be impounded.

Every distress ought to be impounded in a lawful pound. Co. L. 47. b.

A lawful pound is either open or close. Co. L. 47. b.

An open pound is every place in which the putting the cattle does not make the owner a trespasser, and where he may give them to eat and drink without trespass. Doct. & Stud. l. 2. c. 27. Vide 5 H. 7. 9. b.

[*]Be it a common pound erected on the manor for this purpose. Co. L. 47. b.

Or, the close of the party, who makes the distress. Co. L. 47. b.

Or, the close or soil of a stranger with his leave. Semb. 5 H. 7. 9. Co. L. 47. b.

A pound close is where the goods are put into an house or other place, where the owner cannot enter to them. Co. L. 47. b.

Furniture, and goods, which will be damaged by the weather, or are in danger of being stolen, ought to be put in a pound close; otherwise the impounder shall answer for them. Co. L. 47. b.

If cattle be impounded in a pound close, the impounder shall sustain them without allowance for it. Co. L. 47. b.

But if they be put in an open pound, they shall be sustained at the peril of the owner. Co. L. 47. b.

By the common law, a distress might be impounded where the party pleased. 2 Inst. 106.

By the st. of Marl. 52 II. 3. 4. it shall not be impounded out of the county.

And this extends to all goods, or cattle distrained. 2 Inst. 107.

And if a distress for a rent-charge or damage feasant be carried out of the county, the party shall make ransom. 2 Inst. 106.

If a distress be for a rent-service, he shall be amerced. 2 Inst. 106.

And the st. of Marl. as to all taking of cattle is confirmed by the st. W. 1. 16.

And by the st. 1 & 2 Ph. & M. 12. no distress of cattle shall be carried out of the hundred, &c. unless to a pound in the same county within three miles distance, on pain of 5*l.* and treble damages.

And no single distress of goods or cattle shall be impounded in several places to enforce several replevies, on pain of 5*l.* and treble damages.

And none shall take above 4*d.* for impoundage of any one distress, on pain of 5*l.* above the money so taken.

But a lord of a manor, in a distress for his services, may impound upon his manor, though it be in another county: for it is out of the mischief, though it be within the words of st. of Marl. 4. 22 Ed. 4. 11. 2 Inst. 106.

So, if a distress be out of the county, trespass does not lie; but he ought to have an action on the statute. R. per three J. 3 Lev. 48.

So, goods distrained ought to be removed within a convenient time. Mod. Ca. 215.

If the distress be for rent, they shall be removed immediately. Semb. Mod. Ca. 215.

If the party quits the possession after the distress made, before removal, the retaking shall not be deemed a rescue. Mod. Ca. 216.

But by the st. 2 W. & M. 5. corn or hay distrained shall not be removed, &c. from the place where seized, but kept there till replevied, or sold. { Vide Woglam v. Cowperthwaite, 2 Dall. 69. Garrett v. Hughlett, 1 Har. & Johns. 3. }

[By the st. 11 G. 2. 19. distresses for rent may be impounded, secured, and sold on the premises.]

[*](D 2.) *Parco fracto*. When, and by whom it lies.

If cattle or goods distrained be put into a lawful pound, and the owner or a stranger takes them out of the pound, a *parco fracto* lies. F. N. B. 100. E.

And though a servant made the distress, the master shall have the *parco fracto*. F. N. B. 100. E.

So, if cattle are impounded, in the soil of a stranger, with his consent, the distrainer, and not the owner of the soil, shall have the *parco fracto*. F. N. B. 100. E.

A *parco fracto* lies, though the distress and impounding were without cause. R. Bend. 30. 1 Sal. 247. 1 And. 31. 1 Rol. 673. l. 55.

But if the lord of a manor, or the owner of the soil, put out the cattle, a *parco fracto* does not lie; but an action on the case. Per Jon. Win. 81.

So, if the distress was without cause, and the owner takes them from the pound where the door was unlocked, a *parco fracto* does not lie. 1 Rol. 647. l. 5. Co. L. 47. b.

The writ lies *vi et armis*. F. N. B. 100. F.

But the writ need not shew to whom the property of the cattle or goods belongs. F. N. B. 100. F.

Nor, what kind of cattle they are. F. N. B. 100. F.

So, a declaration in a *parco fracto* need not shew a title to make the distress. 1 Sal. 247.

To a *parco fracto* the defendant shall plead not guilty.

If he says, that being lord of the soil he broke the lock to put in others of his own, it is ill: for it amounts to the general issue: for if the cattle did not escape, it is not a breach of the pound. Win. 80.

(D 3.) Rescous.—When it lies.

So, if a distress be rescued before the impounding, the party who made the distress may have a writ of rescous. F. N. B. 101. C.

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If the distress was by a servant, the master shall have rescous. F. N. B. 101. F.

Rescous shall be, where a man rescues, or sets at large, goods lawfully distrained. Co. L. 160. b. Vide Rescous, (A.)

If cattle distrained go into the house of the owner, and he upon demand refuses delivery, it will be a rescous. Co. L. 161. a.

(D 4.) Remedy for a rescous.

By st. 2 W. & M. 5. on a pound-breach or rescous of goods distrained for rent, the person grieved, by special action on the case, may recover treble damages, and costs of suit against the offender, or owner of the goods, if they be found to come to his use or possession. Lut. 213. Vide Pleader, (2 S 29.) [Vide the st. 11 G. 2. 19. s. 10.]

[It is no answer to an action on this stat. that the rent and demand were tendered after the distress and impounding. B. R. M. 34 Geo. 3. 5 T. R. 432.]

So, by the common law, the master, for whom the distress was made, may have remedy by writ of rescous. F. N. B. 101. F. Vide Rescous, (C).

So, the party may maintain an action on the case on the st. 2 W. & M. though no notice of a distress was given to the lessee: for notice [*] signifies nothing to a wrong-doer. R. Lut. 214. Vide Pleader, (2 S 29.)

(D 5.) When rescous does not lie.

But goods cannot be rescued before they are in the possession of him who distrains: for if he is prevented from making the distress, an action on the case lies, not rescous. F. N. B. 102. F.

So, if he who takes the distress, quits the possession of the goods, the taking of them will not be a rescous. R. Mod. Ca. 215.

So, a man may make rescous, if his cattle or goods be taken without cause; or, if he be frequently distrained, so that he cannot manure his land, he shall have an *assise de sovent distress*. 4 Co. 11. b.

As, if the lord distrains for rent when nothing is in arrear. 4 Co. 11. b. Co. L. 160. b.

So, if he distrains for rent due by encroachment, the tenant may tender so much as is due of right, and make rescous if it be refused. 4 Co. 11. b.

So, if the tenant tenders the rent before distress, which is refused, and the lord afterwards distrains, the tenant may make rescous. Co. L. 160. b. 2 Inst. 107.

So, if the lord distrains out of his fee, the tenant may make rescous. Co. L. 161. a. Vide ante, (A 3.)

Or, in a highway, or place where by law he ought not to distrain. Co. L. 160. b. Vide ante, (A 3.)

So, if the cattle of a stranger are taken, the owner may make rescous. Co. L. 160. b.

Or, beasts of the plough, &c. which ought not to be distrained. Co. L. 161. a. Vide ante, (B 1, &c.)—(C).

Or, any thing not distrainable by common law, or statute. Co. L. 161. a.

So, a rescous may be made upon a distress for a rent-charge, as well as for a rent-service, if the distress is not lawful. Co. L. 160. b.

Or, upon a distress for an amerciamment, which does not appear to be lawful.

As, if it be upon a presentment in a leet for diverting a highway : for it cannot be diverted, though it may be stopped or obstructed : but to divert is proper for a watercourse. R. 1 And. 234.

(D 6.) But a distress shall not be used.

So, a distress ought not to be abused ; for that makes him, who distrained, a trespasser *ab initio*. Vide Trespass, (C 2.)

As, if he drives it to another county, and there sells it. R. 1 And. 65.

If a horse three times leaps over the pound, for which he ties the horse to a stake in the pound, and the horse chokes himself by the rope. 1 Rol. 673. l. 26.

If a man works cattle distrained. 1 Leo. 220.

If a man distrains an hide, and for preservation tans it. R. Cro. El. 783. 2 Rol. 562. l. 25.

If he distrains a hogshhead of beer, and tastes the liquor. R. Mod. Ca. 215, 6.

So, if a man milks a cow ; though it be for the benefit of the cow. R. [*]1 Rol. 673. l. 32. Noy, 119. 1 Leo. 220. Vide 2 Cro. 148. Semb. cont.

If he cords a trunk for greater security, being informed that there are in it things of value. D. 1 Vent. 37.

But using for the benefit of the owner shall be allowed : as, if he scours armour taken for a distress. Vide Cro. El. 783.

So, if cows, horses, &c. are taken in withernam, they may be milked or worked in a reasonable manner : for they are delivered to the party in lieu of his own cattle. R. 1 Leo. 220.

And when the cattle are restored, the labour shall be for their diet. Ow. 46.

So, if several barrels of beer are distrained for rent, and the distrainer takes the liquor of one ; he shall be a trespasser only for that barrel. Mod. Ca. 226.

[By the 11 G. 2. 19. s. 19, 20. distresses for rent shall not be deemed unlawful for any irregularity, or unlawful act afterwards done by the party distraining, nor the party deemed a trespasser *ab initio* : but the parties grieved thereby, may recover satisfaction for the special damage and no more, in an action of trespass, or on the case, and the plaintiff recovering shall be paid his full costs of suit. But no tenant shall recover in such action, if tender of amends hath been made by the party distraining.]

(D 7.) Nor sold.—By the common law.

So, by the common law, a distress for rent cannot be sold.

Yet, by the common law the king might sell it.

But not the cattle of an under-lessee of his tenant after the rent incurred : though they might be distrained. 2 Rol. 159. l. 45.

So, a distress for a fine, or amerciament, in a leet the lord may sell, or impound, at his pleasure. 8 Co. 41. b.

So, by custom, he may sell upon a *distringas pro certo lctæ*, or for an amerciament in a court baron. R. 1 Sal. 379.

So, where a statute gives an execution for a penalty by distress, without more, the officer may sell. R. 2 Jon. 25. R. 1 Sal. 379.

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(D 8.) When by statute.

But now, by the st. 2 W. & M. 5. if goods be distrained for rent due, on demise, or contract, and the owner does not replevy them in five days next after such distress taken, and notice thereof with the cause of taking, left at the chief mansion, or other most notorious place of the premises charged with the rent, then after such distress, notice, and five days, the distrainer, with the sheriff, under sheriff, or constable of the hundred or place, may cause the goods to be appraised by two sworn appraisers, (whom the sheriff, under sheriff, &c. may swear,) and afterwards may sell the same for the best price that can be gotten, towards satisfaction of the rent, and charges of such distress, appraisement, and sale, leaving the overplus, if any, in the hands of the sheriff or constable for the owner's use.

If a distress be for rent, notice of it ought to be given.

[But in the notice, it is not necessary to mention, when the rent became due for which the distress was made. Doug. 281.]

[The five days allowed by stat. 2 W. & M. c. 5. may be inclusive of the day of sale, but must be exclusive of the time of it. 1 H. B. 13.]

[*]And all goods distrained, except corn and hay, ought to be removed immediately. R. Mod. Ca. 215.

But notice may be given to the tenant in person, as well as left at his house, &c. R. T. 7 W. 3. B. R. 1 Sal. 247. (Vide 1 Ld. Ray. 54.)

And if they are not the goods of the tenant himself, notice to the owner of the goods is sufficient. R. 4 Mod. 394, 5. in trover, or other action for the goods, by the owner. 1 Sal. 247.

But if the tenant had brought a replevin for the goods, notice to the owner had not been sufficient, without notice also at the mansion of the tenant, or other notorious place upon the premises. 1 Sal. 247. (Vide 1 Ld. Ray. 54.)

So, if a distress be upon land within two hundreds, the constable of the hundred, where the distress was impounded, may swear the appraisers. R. 4 Mod. 395. 1 Sal. 247. (Vide 1 Ld. Ray. 55.)

Yet a distress cannot be conveyed to a remote county. 1 Sal. 247.

A sale by the distrainer or his servant is sufficient, though the sheriff, &c. be not present at the sale. R. T. 7 W. 3. B. R. Vide 4 Mod. 390.

And a sale for a price at which they were appraised, shall be intended the best price, if the contrary does not appear. R. 4 Mod. 391. (Vide 1 Ld. Ray. 55.)

So, now by the st. 4 G. 2. 28. remedy shall be by distress and sale, for rents-seck, of assise, and chief-rents, paid three years in twenty years before that session of parliament, or afterwards created, as for rent reserved on lease.

[By the st. 11 G. 2. 19. notice of the place where goods distrained are deposited shall within one week be given to the lessee, or left at his last place of abode; and if after a distress for rent, taken of corn, &c. growing, &c. the rent and costs of the distress be paid or tendered, the distress shall cease, and the corn, &c. shall be delivered to the tenant.]

[And by the same stat. distresses may be impounded, appraised, and sold on the premises.]

[A distress cannot be supported on a rent-seck, but on the authority of this statute, and therefore the avowry must state, that the rent had been duly answered, or paid for the space of three years, within the space of twenty years before the first day of the session of parliament, when the statute passed. Dict. per Buller J. Doug. 628.]

DONATIVE.**(D 9.) When not.**

Yet by st. 2 W. & M. 5. if distress and sale shall be made for rent, when no rent is due, the owner of the goods distrained may by trespass, or action on the case against the distrainer, his executor or administrator,* recover the double value of the goods distrained and sold, with full costs. Vide 4 Mod. 231.

And the plaintiff need not allege a demise in form. R. 4 Mod. 232.

And it is sufficient to say, that the defendant took the goods *nomine distractionis*. R. 4 Mod. 232.

REPLEVIN. When replevin lies upon a distress, vide in REPLEVIN.—

PLEADER, (3 K 1, &c.)

Vide more of title Distress, in BYE-LAW, (D 2.)—PLEADER, (2 S 19.—3 M 25.)—RENT, (D 3, &c.)—SEISIN, (E.)—SEWERS, (E 6.)

[*]DISTRIBUTION.

DISTRIBUTION OF A BANKRUPT'S ESTATE. Vide BANKRUPT, (D 30, 31.)

—————AN INTESTATE'S ESTATE. Vide ADMINISTRATION, (H)—

CHANCERY, (3 D 1, &c.)

DISTRIBUTIVE WORDS. Vide PAROLS, (A 13.)

DISTRINGAS.

Vide ENQUEST, (C 6.)—PROCESS, (D 7.)

DISTURBANCE.

Vide ACTION UPON THE CASE FOR A DISTURBANCE.—PLEADER, (3 I 6.)
—QUARE IMPEDIT, (D.)

DIVINE SERVICE.

Vide SACRAMENTS, (B—E.)

DIVORCE.

Vide ABATEMENT, (H 43.)—BARON AND FEME, (C 1, &c.)—DOWER, (A 1, 2.)—PLEADER, (2 Y 12.)

DOGS.

Vide CHASE, (M.)

DONATIVE.**(A) THE ORIGINAL OF IT, &c.**

The king founds a church, hospital, or chapel, and exempts it from the jurisdiction of the ordinary; this shall be a donative. Co. L. 344. a.

So, if he founds it, though he does not exempt it by express words. Co. L. 344. a.

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So, if a subject, by the king's licence, founds a church, or chapel, to be exempt from the jurisdiction of the ordinary, it shall be a donative: and this was the original of all donatives. Co. L. 344. a.

Originally all abbies and priories were donative.

So, all the bishoprics, in England were donative by the delivery of a crozier and ring, till by a charter 5 June 17 Joh. they were made eligible. Co. L. 344.

A prebend, chantry, and chapel may be donative. Co. L. 344. a.

And, at this day, a parochial church of the king's foundation may be donative, and shall have the cure of souls. 2 Rol. 341. l. 20.

[*]So, if it be of the foundation of a subject. Semb. Co. L. 344. a. 2 Rol. 341. l. 30. 2 Cro. 63.

But generally, a donative has not *curam animarum*, where it has not presentation and institution. Per Twisd. and Keeling, 1 Mod. 11.

A donative is exempted from the jurisdiction of the ordinary. Co. L. 344. a.

And therefore, the incumbent need only have the donation from the patron, without admission or institution by the ordinary. Co. L. 344. a. Dav. 46. b. 2 Cro. 63.

And a lapse does not incur for want of a donation, if it be not specially provided in the foundation. Co. L. 344. a. 2 Cro. 517.

[But by st. 1 G. 1. st. 2 c. 10. s. 6. such donatives as by that statute receive the benefit of queen Anne's bounty, shall be subject to lapse, &c. in the same manner as presentatives, s. 7. provided that though the lapse be incurred, yet if the person entitled shall nominate before advantage taken of the lapse, his nomination shall be good. Vid. 1 T. R. 396.]

The ordinary cannot visit; but the patron may. Co. L. 344. a. Dav. 46. b.

If the king be patron, he visits by his chancellor. Co. L. 344. a. Vide Visitor, (A 2.)

If a subject, he visits by commissioners. Co. L. 344. a. 2 Rol. 341. l. 30. Vide Visitor, (A 4.)

So, the patron solely may deprive for heresy or other offence. R. Yel. 61, 2.

The patron solely shall inquire of the reparation and ornaments. 1 Mod. 90.

If the bishop intermeddles with that which belongs to the patron, a prohibition shall go. 1 Mod. 90.

Yet the incumbent ought to be *infra sacros ordines*; for his function is spiritual. Co. L. 344. a. if the donative has a cure. 2 Rol. 341. l. 35. R. Yel. 61.

[The incumbent of a donative must be twenty-three, in deacon's orders, subscribe, read, &c. as for any other benefice: but it is not necessary for him to prove the performance of them. M. 13 G. 3. 3 Wils. 355.]

And if he be disturbed, the patron shall have a *quare impedit presentare ad ecclesiam*, and shall count upon the special matter. Co. L. 344. a. Vide Pleader, (3 I 6.)

So, he may be cited to take a licence from the bishop to preach; and a prohibition does not go. R. 1 Mod. 90. 2 Keb. 876.

[He need not have a licence to preach. M. 13 G. 3. 3 Wils. 355.]

[In the case of a donative, the party is in full possession immediately on his nomination, without the bishop's licence, and he may maintain an action for money had and received against any person who takes the profits. Dict. per Ashhurst J. 1 T. R. 403.]

Or, for marrying there without licence. R. per three J. 1 Sid. 432. 1 Mod. 22.

So, if he presents to a donative by simony, it will be within the stat. 31 El. 6. R. Cro. Car. 331.

But if it be doubted, whether it be donative or presentative, and any sues for induction, a prohibition does not go : for till induction the incumbent has no remedy to try the right ; and if it be a donative, the induction is null. R. Cro. El. 653.

[*]So, if a patron presents his clerk to a donative, to the ordinary, who admits and institutes him : it shall never be donative afterwards, but always presentative. Co. L. 344. a. 2 Rol. 342. l. 45. 2 Cro. 63.

But a presentation to a donative by a stranger, and admission and institution upon it, do not make the church presentative. Co. L. 344. a. 2 Rol. 342. l. 50.

Or, to a donative created by the king's letters patent. Per two J. Sal. 541.

If an incumbent of a donative resigns his church to the patron, the property is divested out of him, without other ceremony. R. 2 Cro. 63. Yel. 61. Mo. 765.

And if there be two patrons, if he resigns to one of them, if the other assents. R. 2 Cro. 63.

So, if he resigns to one of the patrons and a stranger. R. Yel. 61.

A resignation in the words of the donation, as, of his church, amounts to a resignation of the whole. R. 2 Cro. 63. Yel. 61.

But if the patron refuses to make a donation when the church is parochial, the ordinary may compel him to make it : for he is not exempt, though the church is. Per four J. Yel. 61.

[A. being seised of advowson of donative, the church becomes void ; A. dies (the church still void), having first made his will and B. executor ; it descends to the heir at law : was it presentative, the executor would have title. P. 3 G. 3. 2 Wils. 150.]

[Donatives with cure of souls, are within the acts of uniformity. 2 Blk. 851. 3 Wils. 355.]

DOUBLE DECLARATION.

Vide PLEADER, (C 33.)

DOUBLE PLEA.

Vide PLEADER, (E 2.)

DOUBLE REPLICATION.

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[*]DOWER.

(A) DOWER BY THE COMMON LAW.

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(A) DOWER BY THE COMMON LAW.

(A 1.) What wife shall be endowed.

Dower is by the common law, by custom, *ad ostium ecclesiæ, ex assensu patris, or de la plus beale*.

Dower by the common law is, when a woman takes an husband seised in fee, in general tail, or as heir to a special tail, after the death of her husband, (if she be then nine years old,) she shall be endowed [*] of a third part of all lands and tenements of which her husband was seised during the coverture, to hold in severalty for her life. Lit. s. 36.

Every wife regularly shall be endowed.

Though she was a nief before marriage. Co. L. 31. a.

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Though she was divorced *a mensa et thoro*. Co. L. 33. b. ; or divorceable *a vinculo*, if the husband died before the divorce. Co. L. 33. a.

{ So the wife shall be endowed where she is divorced *a vinculo matrimonii*, as if the husband were dead. Smith v. Smith, 13 Mass. Rep. 231. Davol v. Howland, 14 Mass. Rep. 219. }

Though the wife was attainted for felony, &c. if she was afterwards pardoned before the death of her husband. Co. L. 33. a. Vide post, (F 1.)

Though her husband was an idiot, or *non compos*, or outlawed. Co. L. 31. a.

Attainted for felony, trespass, *præmunire*, heresy, &c. Co. L. 31. a.

Though the husband was a villein to a common person, if the husband died before the entry of his lord. Co. L. 31. a.

So, where the husband was attainted for treason, after the attainder reversed by error. Mo. 639.

[A woman married in Scotland, not in evasion of the laws of England, is dowable of lands in England. 2 H. B. 145.]

(A 2.) What not.

But if the wife of a subject be an alien, she shall not be endowed. Co. L. 31. b. Vide Alien, (C 1.)

Nor, the wife of an alien. Co. L. 31. a. { Sewall v. Lee, 9 Mass. Rep. 363.

But the wife of an alien, who was herself an alien, may be endowed of lands of which her husband was seised before the declaration of independence of the United States. Kelly v. Harrison, 2 Johns. Cas. 29. }

Nor, the wife of the king's villein. Co. L. 31. a.

So, if an alien, after alienation by her husband, be made a denizen, she shall not be endowed. Co. L. 33. a.

So, if the marriage be divorced *a vinculo*, the woman shall not be endowed. Co. L. 33. b. 1 Rol. 681. R. 47 Ed. 3. pl. 78.

Nor, if a wife elopes from her husband, and be not reconciled. Vide post, (F 2.)

So, the woman shall not be endowed, if it be not a lawful marriage : for it shall be tried by the bishop. 1 Leo. 53.

So, if the husband be attainted for high treason, his wife shall not be endowed. Co. L. 31. a. ; for the st. 1 Ed. 6. 12. which allows dower to the wife of a person attainted of treason, is repealed as to this by the st. 5 & 6 Ed. 6. 11. Co. L. 37. a. 41. a. Vide post, (F 1.) Vide Forfeiture, (B 2.)

Though the treason was committed after the title to dower commenced. Co. L. 31. a. 1 Leo. 3.

So, a Jew, who is not converted to Christianity with her husband, shall lose her dower. Co. L. 32. a.

So, the wife shall not have dower, if the husband be attainted for treason, though afterwards pardoned. 1 Leo. 3.

So, if a husband takes a wife, living his former wife ; the second marriage is null, and the wife shall not be endowed. Perk. s. 304.

So, if a wife takes a second husband in the life of the former, she shall not be endowed. Perk. s. 305.

So, if a woman be contracted to a husband who dies before the marriage is completed. Perk. s. 306.

(A 3.) At what age.

A wife shall be endowed if she be of the age of nine years at the death of her husband ; though she cannot assent to the marriage before the age of twelve years. Co. L. 33. a.

[*]Though the husband was under the age of nine years. Co. L. 33. a. 40. a.

Though the husband aliens the land before the wife attains her age of nine years. Co. L. 33. a.

Though the wife was above the age of one hundred years ; so that by possibility she could not have issue. Co. L. 40. a. 1 Rol. 675. l. 11.

But a wife shall not have dower by the common law, if she be under the age of nine years at the death of her husband. Co. L. 33. a. Vide 1 Rol. 675. l. 15.

Yet a wife may have dower *ex assensu patris*, or *ad ostium ecclesie*, before such age. Co. L. 37. a.

(A 4.) Of what seisin.

A wife shall be endowed where the husband had a seisin in law, as well as where he had an actual seisin. Co. L. 31. a.

And therefore, if after a descent of land the husband dies before entry, his wife shall be endowed. Co. L. 31. a.

So, a wife shall be endowed, though the seisin did not continue till the death of the husband : as, if a man seised in fee takes a wife, and then sells, or aliens his lands to another and his heirs. Co. L. 32. a.

So, a wife shall be endowed, though the estate of her husband be evicted by an elder title, after cesser of the eviction : as, if the grandfather enfeoffs the father, and afterwards the wife of the grandfather recovers dower from him, and dies ; the wife of the father shall be afterwards endowed of the same land. Co. L. 31. b.

So, if land descends to the father, who dies, and his wife is endowed ; if the wife of the grandfather recovers her dower against her, and afterwards dies, the wife of the father shall have the land after her death. Co. L. 31. b.

So, the wife shall be endowed, where the estate of the husband is evicted by covin : as, if a man recovers against him by his reddition, without right. 2 Inst. 349.

So, by the st. W. 2. 4. if there be a recovery by default, and he cannot shew that the recoveror had a right. 2 Inst. 349.

So, a wife shall be endowed where the husband had the estate, though it was upon trust to give to another : as, if a feoffment be to A. upon condition that he enfeoff B. ; the wife of A. shall be endowed. 1 Rol. 678. l. 36.

If a bargain and sale be to A. in fee, in consideration that he redemise to the bargainor, upon a condition to be void ; though it be in the nature of a mortgage, yet the wife of A. shall be endowed : for it ought to be a bargain to two if he would avoid the dower of the wife ; and therefore equity will not give relief. Certified to Chancery, Cro. Car. 191.

{ The possession of land by the husband for several years, and a conveyance by him, in fee, to the tenant, is *prima facie* evidence of seisin in the husband. Bancroft v. White, 1 Caines' Rep. 185. Vide Embree v. Ellis, 2 Johns. Rep. 119.

In an action of dower, the tenant, claiming under the husband or his heirs, is estopped from denying the seisin of the husband. Hitchcock v. Carpen-
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ter, 9 Johns. Rep. 344. Hitchcock v. Harrington, 6 Johns. Rep. 290. Collins v. Torry, 7 Johns. Rep. 278.

Miscellaneous cases relating to the seisin of the husband. Dolf v. Bassett, 15 Johns. Rep. 21. Winn v. Elliot's widow, Hardin, 482. }

(A 5.) Of what not.

But a wife shall not be endowed, where her husband had seisin only for an instant, or as an instrument: as, if *cestui que use*, after the st. 1 R. 3., and before the st. 27 H. 8. 10., had made a feoffment, his wife would not be endowed. Co. L. 31. b. } Vide Holbrook v. Finney, 4 Mass. Rep. 566. Clark v. Munroe, 14 Mass. Rep. 351. Stow v. Tiffit, 15 Johns. Rep. 458. }

So, if a feoffment be now to B. and his heirs, to the use of C. and his heirs: the wife of the feoffee shall not be endowed.

Nor, the wife of the conusee of a fine who renders the estate to the conusor. Co. L. 31. b. 2 Co. 77. a.

[*]If a copyhold escheats to the lord of a manor, who afterwards grants it by copy; his wife shall not be endowed of it. R. 4 Co. 24. a.

If a mortgagor pays the money at the day, the wife of the mortgagee shall not be endowed. Cro. Car. 191.

Or, if he redeems by consent after the day. Q. 1 Rol. 679. O.

So, if tenant for life makes a feoffment; though he has a fee, who gives a fee, his wife shall not be endowed: for the same instant that he had a fee, it was out of him. 2 Cro. 615. 1 Rol. 676. l. 45.

So, if a joint-tenant makes a feoffment; though the estate was severed for an instant. 2 Cro. 615.

So, if tenant in special tail makes a feoffment, with a letter of attorney, &c. and then takes a wife, and afterwards livery is made. R. 2 Cro. 615. 1 Rol. 676. l. 50.

So, a wife shall not be endowed, where the seisin of her husband is wholly defeated: as, if land descends to A. who enters, and then his mother recovers dower from him, and afterwards dies; the wife of A. shall not be endowed: for the seisin of A. was entirely defeated. Co. L. 31. a.

If a feoffor enters upon a feoffee for a condition broken; the wife of the feoffee shall not be endowed: for his seisin is defeated by the re-entry of the feoffor. Perk. s. 311, 312. 1 Rol. 474. O.

If land taken in exchange, or allotted upon partition, be afterwards recovered in value, upon eviction of the land given in exchange, &c. the wife shall not be endowed of the land recovered. Perk. s. 309, 310.

So, if the seisin of the husband be evicted by a recovery upon title, his wife shall not be endowed. 2 Inst. 349.

So, if tenant in special tail, makes a discontinuance, and takes back an estate in fee, and afterwards takes another wife, and dies, and the issue in tail enters; the second wife shall not be endowed: for the seisin of the fee is defeated by the remitter. Co. L. 31. b. Dy. 41. a.

Nor, where the estate of the husband is determined: as, if a feoffment, or covenant to stand seised, &c. be to the use of B. and his heirs till C. marries; B. dies, his heir takes a wife, and dies, and then C. marries; the wife shall not be endowed. Dub. 1 Rol. 676. F.

So, a wife shall not be endowed, where her husband had not seisin in fact, or in law, during the coverture. Co. L. 31. a. } Vide Eldridge v. Forrestal, 7 Mass. Rep. 253. }

So, if a bargain and sale be upon condition, and the condition be broken, and the bargainor dies before entry; his wife shall not be endowed: for

though the use revests without entry, yet by the st. 27 H. 8. the use is incorporated with the land, and without entry he is not seised of the land, and therefore his wife shall not be endowed. 6 Co. 34. a.

So, a wife shall not be endowed of land given in exchange, and also of land taken in exchange: but she has her election to have the one or the other. Co. L. 31. b.

(A 6.) Of what estate.

A woman shall be endowed, where her husband was seised in fee, in tail general, or as heir in special tail. Lit. s. 36.

And generally, in every case, where the issue which the husband may have by his wife by possibility may inherit, as heir to the husband to such estate in the tenements as the husband has, his wife shall be endowed. Lit. s. 53.

And therefore, where land is given to A. and the heirs of his body [*] upon B. his wife begotten; though A. be donee in special tail, B. shall be endowed: for her issue may inherit the same estate as heir to the husband. Lit. s. 53.

So, if an estate be limited to A. for life, remainder immediately to him in fee, or in tail, without any mesne remainder; his wife shall be endowed; for he has both estates in him. 1 Rol. 677. l. 10. 25. Perk. s. 338.

[If A. *senior et ux.*, and A. *junior et ux.*, covenant to levy a fine to the use of the conusees, which is done; and the conusees by lease and release convey to the use of A. *senior* for life, and to his wife if she survive, then to A. *junior*, (his son and heir-apparent,) remainder to his first and other sons in tail male, remainder to his daughters in tail, remainder to A. *senior* in fee, with a power to A. *junior* to settle on any other wife; A. *senior et ux.* die without other issue, in the lifetime of A. *junior*, his wife dies; he marries again, and dies without issue; his wife is entitled to dower in these lands. H. 7 G. 2. B. R. H. 13.]

So, if there be a mesne remainder for years; but *cessit executio* during the term. Perk. s. 336. R. 1 Sal. 254. Lut. 729.

So, if there be a mesne remainder for life, who surrenders his estate to the tenant for life. 1 Rol. 677. l. 18.

Though the surrender be upon condition: for the estate is gone till the condition is broken. 1 Rol. 677. l. 20.

So, if an estate be to A. for life, remainder to B. for years, remainder to A. in tail or in fee; the wife of A. shall be endowed. R. 1 Sal. 254. Lut. 733.

So, if an estate be limited to A. for years, remainder to B. in tail, or in fee; the wife of B. shall have dower of the reversion or remainder. Lut. 733.

So, if a man makes a lease for years, rendering rent and takes a wife, she shall be endowed of the reversion and a third part of the rent. Co. L. 32. a. R. 1 Rol. 678. l. 15.

{ And if a wife join her husband in a lease for years, she shall be endowed of the rent. Herbert v. Wren, 7 Cranch, 370. }

Yet, if no rent be reserved upon the lease for years, execution shall stay during the term. R. 1 Rol. 678. l. 20.

So, if a term be to A., remainder to B. in tail, &c.; though the term be upon trust to attend the inheritance, the wife of B. shall not have dower till the expiration of the term. R. Ca. Parl. 71.

And if B. sells, and the term is assigned to defend the purchaser; chan-
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cery will not decree the trust of the term to the wife for a third part. R. Ca. Parl. 69.

But a term upon trust to attend the inheritance shall be decreed in equity to tenant in dower, against the heir at law. R. Ca. Parl. 70.

So, if the husband has a defeasible estate in fee, tail, &c. his wife shall be endowed till his estate be defeated. 1 Rol. 677. l. 27. 40. Vide ante, (A 5.)

As, if husband and wife, lessees for life, make a surrender to the lessor, which is avoidable by the wife lessee; yet the wife of the lessor shall be endowed till the surrender be defeated. 1 Rol. 667. l. 30. 45.

So, the wife of a disseisor, till the disseisin be avoided. 1 Rol. 677. l. 47.

So, if husband and wife, and A., be tenants in common, and the husband dies before partition; the wife shall be endowed of his part against his heir. R. 3 Lev. 84.

[*][A woman shall be endowed of an estate of which her husband was seised for life, with a remainder in fee, or in tail, notwithstanding the intervention of a term for years between the estate for life and the remainder. Ld. Rd. 326.]

[Of a similar estate where a freehold intervenes between the estate for life and the remainder, not. Ld. Rd. 327.]

[If an estate is limited to A. to the use of such persons as B. shall by deed or will appoint, and in default of such appointment to the use of B. in fee, B.'s widow shall have dower thereof: for until B. appoints, the legal fee vests in him. Semb. 4 Taunt. 334.]

{ It seems, that a widow may be endowed of an equity of redemption. Fish v. Fish, 1 Conn. Rep. 559. Vide Bird v. Gardner, 10 Mass. Rep. 364. Bolton v. Ballard, 13 Mass. Rep. 227. Snow v. Stevens, 15 Mass. Rep. 278. Hitchcock v. Harrington, 6 Johns. Rep. 290. Collins v. Torry, 7 Johns. Rep. 278. Coles v. Coles, 15 Johns. Rep. 319. }

(A 7.) Of what not.

But if there are join-tenants in fee, and one dies; his wife shall not be endowed: for the estate survives. Co. L. 31. b. { Vide Holbrook v. Finney, 4 Mass. Rep. 566. }

So, if the husband be seised in special tail, the second wife shall not be endowed: for the issue of the second wife cannot by possibility inherit the same estate as heir to the husband. Lit. s. 53.

Though the issue of the wife by possibility may inherit to him: as, if tenant in tail general makes a feoffment, and takes back an estate to him and his wife, and the heirs of their bodies; the wife dies; and the husband takes another wife, and dies; the second wife shall not be endowed: for during his life he was seised in special tail, though the issue by the second wife by possibility might inherit. Co. L. 31. b.

So, if the husband has only an estate for life, his wife shall not be endowed.

Though the estate be to him and his heirs for the life of B. 1 Rol. 676. l. 43. D. cont. 1 Sand. 261. Vide Estates.

Though the inheritance be also to the tenant for life, if it be not executed in him: as, if it be to A. for life, remainder to B. for life, or in tail, remainder in fee, or in tail, to A.: the wife of A. shall not be endowed. R. 1 Rol. 677. l. 15. Perk. s. 333. 335. 1 Sal. 254.

So, if an estate be granted to A. and B., and to the heirs of B., who dies, his wife shall not be endowed; for the fee was not entirely executed during the life of A. Perk. s. 334.

So, if the remainder-man for life, or in tail, grants his estate to tenant for life : for it was *quasi* a reversion in him in remainder. 1 Rol. 677. l. 5.

So, if there be a remainder for the life of tenant for life upon trust to preserve contingent uses. R. 3 Lev. 437.

{ So, if a remainder in fee is dependent on the life estate of another, and the husband alienates the remainder during coverture, the wife shall not be endowed. *Shoemaker v. Walker*, 2 Serg. & Rawle, 554. }

So, if the husband has only a term for years, his wife shall not be endowed by law or equity. Ca. Parl. 72.

So, if A. be seised in trust for B. in fee, &c. the wife of B. shall not be endowed in law or equity. Ca. Parl. 71.

[If land is conveyed to trustee and his heirs, to the use of him and his heirs, to stand seised to the use of the heirs of A., and A. devises this trust-estate to B. who dies, B.'s wife is not dowable of it. M. 9 G. 2. C. T. T. 138.]

{ But it has been held in Pennsylvania, that a widow may be endowed of a trust estate. *Shoemaker v. Walker*, 2 Serg. & Rawle, 554. }

(A 8.) Of what lands and tenements.

A wife shall be endowed of the third part of such lands and tenements of which her husband was seised during the coverture.

And therefore, a wife shall be endowed of a rent-service, charge, or seck. Co. L. 32. a.

[*]Of common certain, appendant, or appurtenant. Co. L. 32. a.

And it shall be intended common appendant, if it does not appear to the contrary. R. Jon. 315.

Of tithes, vide Co. L. 32. a.

{ Where land of the husband is taken by execution, the widow is dowable of the land, as it existed at the time of the extent ; but she cannot claim the benefit of erections and improvements made afterwards. *Ayer v. Spring*, 9 Mass. Rep. 8.

The widow is also dowable of lands alienated by her husband, where she only affixes her signature and seal to the deed, her name not otherwise appearing in the deed ; and as against the alienee of the husband she will be entitled to dower in the land, as it was at the time of alienation ; but as against the heir, she will be entitled to the benefit of improvements made after the descent. *Catlin v. Ware*, 9 Mass. Rep. 218. Vide *Ayer v. Spring*, 10 Mass. Rep. 80. *Lufkin v. Curtis*, 13 Mass. Rep. 223.

Dower is not barred by a conveyance of the husband's land, executed by husband and wife, if any legal formality be omitted. *Kirk v. Dean*, 2 Binn. 341.

So where the husband mortgages land, and the wife releases her right of dower to the mortgagee, and after the husband's death, his administrator discharges the mortgage, the wife is dowable. *Mildreth v. Jones*, 13 Mass. Rep. 525.

Tenant in fee conveys an undivided moiety of land ; and the wife releases her right to dower, partition is made ; it was held, that the wife was dowable only of the part assigned to the husband. *Potter v. Wheeler*, 13 Mass. Rep. 504. }

So, a wife shall be endowed of the chief mansion or messuage of her husband. Co. L. 31. b.

Though it be a castle : for Mag. Charta, 7. shall be understood only of a castle for defence of the realm. Co. L. 31. b.

Though it be the capital seat, where her husband was a baron of the realm: for *caput baroniæ* is understood of the principal seat of feudal baronies given by the king to be held for the defence of the realm. R. 1 Sal. 253. 3 Lev. 401. 5 Mod. 65. Skin. 592.

[Dower does not lie of a tenement. P. 11 G. Str. 625.]

[It lies of a messuage or workshop. M. 8 G. 2. B. R. H. 72.]

So, she shall be endowed of entire tenements, though it cannot be by metes and bounds: as, of a mill; and she shall have the third toll-dish, or the whole mill every third month. Co. L. 32. a.

So, of a villein; and shall have his labour every third day, week, or month. Co. L. 32. a.

Of the profits of a fair or office. Co. L. 32. a.

Of stallage, a dovecote, a piscary; and shall have the third fish, or *tertium jactum retis*. Co. L. 32. a.

Of an advowson; and shall have the third turn. Co. L. 32. a.

[The shares in the navigation of the river Avon, under the stat. 10 Anne, held by M. R. to be real estate, and subject to dower. 2 Ves. jun. 652.]

[A feme is dowable of mines wrought at any time during the coverture, whether or not the heir, or other succeeding owner, continues to work them, and whether or not the surrounding soil belongs to the husband. Secus, of mines not opened, whether leased or not. 1 Taunt. 402.]

[Where mines are in lease, dower is assignable, if the lease was before coverture, in the rents reserved; if during coverture, in the mines themselves. 1 Taunt. 402.]

[A woman shall be endowed of the capital messuage of any barony, which is not a barony by tenure. Ld. R. 72.]

[Thus, where a man was seised of a capital messuage called Bromley, was made baron of Bromley, the court held his widow entitled to dower of that house because as he had the house before he was made baron, and it was not given to him at the creation of the barony he was not a baron by tenure. Ibid.]

(A 9.) Of what not.

But the queen shall not be endowed of the crown of England. 1 Rol. 676. l. 3.

So, a wife shall not be endowed of common in gross uncertain. Jon. 315.

So, by the common law, a wife shall not be endowed of chattels, though by the civil law she may. 1 Rol. 675. l. 40.

(A 10.) When title to dower commences.

To a title to have dower three things are necessary: marriage, seisin, and the death of the husband. Co. L. 31. a. 32. a.

[*](A 11.) Assignment of dower; quarentine.

[Assignment of dower may, with consent, be of an undivided third part, instead of by metes and bounds. 2 N. R. 1.]

[Neither livery of seisin nor writing is necessary to an assignment of dower. 2 N. R. 1.]

[Where dower is due of mines, and the whole are not assigned, the assignment may be either of a proportion of the profits, or by direct and sep-
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arate alternate enjoyment of the whole by the dowress and the heir, for short periods, proportioned to their shares. 1 Taunt. 402.]

[Where dower is due of land and mines therein, it may be assigned wholly in one, in exclusion of the other; but where the mines are in another's land, the assignment must be of a proportionable part. 1 Taunt. 402.]

[If the heir at full age assign excessive dower, he has no remedy at law. Secus, where the assignment is by the sheriff in execution of a judgment in dower, when a *scire facias* for an assignment *de novo* lies. 1 Taunt. 402.]

[If excessive dower is assigned by the heir when an infant, or by his guardian, a writ of admeasurement of dower lies. 1 Taunt. 402.]

{ It seems, that the widow cannot enter for dower until after assignment of dower. Jackson v. O'Donaghy, 7 Johns. Rep. 247.

The assignment of dower, where land is alienated by the husband, shall be according to the value at the time of alienation. Humphrey v. Phinney, 2 Johns. Rep. 484. Dorchester v. Coventry, 11 Johns. Rep. 510. Shaw v. White, 13 Johns. Rep. 179. Dolf v. Basset, 15 Johns. Rep. 21.

It seems, that a widow is not dowable of wild and uncultivated lands. Conner v. Shepherd, 15 Mass. Rep. 164. }

By the st. Mag. Chart. 9 H. 3. 7. *Vidua maneat in capitali messuagio mariti sui per 40 dies, infra quos dos ei assignetur*: and this term of 40 days is called her quarentine. Co. L. 32. b. 34. b. 2 Inst. 16.

But by the same statute, *si domus illa sit castrum, domus competens provideatur in qua potest morari donec dos ei assignetur et habeat rationabili estoverium suum in terim.*

And therefore, the wife shall have quarentine only for 40 days. Co. L. 32. b.

Though before the Conquest she would have had it for a year. Co. L. 32. b.

The quarentine shall be allowed in the principal messuage of the husband, of which she is dowable. 2 Inst. 17. { Vide Jackson v. O'Donaghy, 7 Johns. Rep. 247. }

Though it be called a castle; if it be not maintained for war, but for habitation. Co. L. 32. b. 34. b. 2 Inst. 17.

Though it be the principal mansion of a baron, or peer of the realm. R. 3 Lev. 401. 5 Mod. 65. 1 Sal. 253.

And the wife during her quarentine shall have sustenance *de bonis viri*. 2 Inst. 17.

And if she be ousted of her quarentine, the wife shall have a writ to the sheriff, which gives a commission to him to make process against the defendant returnable in two or three days, and put her into possession. Co. L. 34. b. 2 Inst. 17.

But the forty days after the death of the husband, allowed for quarentine, are inclusive of the day of his death, and there are but thirtynine days after. 2 Inst. 17.

So, the wife shall lose her quarentine, if she marries another. 2 Inst. 17. Co. L. 32. b. 34. b.

So, a wife cannot kill the oxen of the husband for her sustenance. Vide 2 Inst. 17.

So, the wife shall not have her quarentine in a house which is a castle maintained for defence of the realm. Co. L. 32. b. 34. b. 2 Inst. 17.

Nor in that which is *caput baroniæ*, which usually was a castle. 2 Inst. 17.

(B)[*]DOWER BY CUSTOM.

By custom, a woman may be endowed of a moiety, the whole, or but a fourth part of the lands, of which her husband was seised. Lit. s. 37. Co. L. 33. b. 21 Ed. 4. 53, 4. Vide Copyhold, (K 2.)

So, by custom, a woman may be endowed of the profits of mines of tin, &c. Dal. 2.

(C) DOWER AD OSTIUM ECCLESIAE.

So, a man of full age might endow his wife *ad ostium ecclesiae, vel monasterii*, after affiance of the whole or part of his land; and there openly declare the quantity and certainty of the land which she shall have. Lit. s. 39.

And in such case the wife shall enter after the death of her husband, without the assignment of any one. Lit. s. 39.

And such endowment shall be good without deed: for he cannot make a deed to his wife. Co. L. 34. a.

Vide Co. L. 34. b. 35. a. 36 a., &c. Lit. s. 41, 42, &c.

DOWER EX ASSENSU PATRIS.

For dower *ex assensu patris*, vide Lit. s. 40, 41, 42, &c. Co. L. 35. a. 35. b. 36. a. 36. b. 37. a. &c.

(D) DOWER DE LA PLUS BEALE.

Dower *de la plus beale* is, when the husband dies having lands, part in chivalry and part in socage, his heir within the age of fourteen years, by which the lord enters as guardian in chivalry into the lands held of him, and the wife into the other land as guardian in socage, and afterwards she bring dower against the guardian in chivalry; he may plead this matter, and pray, that she may be endowed of the most fair of the lands in socage; and judgment shall be accordingly. Lit. s. 48, 49.

So, though the lands in socage be not sufficient for her whole dower, she shall have it in them for so much, and the residue only out of the land held in chivalry. Semb. Co. L. 39. a.

After such judgment to recover *de la plus beale*, &c. the wife may, in the presence of her neighbours, endow herself by metes and bounds of the fairest of the lands in socage. Lit. s. 49.

And she shall hold for her life. Co. L. 39. b.

But the heir, before entry of the guardian in chivalry, cannot pray that the wife shall be endowed *de la plus beale*: for it is a privilege allowed only for saving the estate of the guardian in chivalry. Lit. s. 50. Vide Co. L. 39. b.

So, such endowment cannot be without the judgment of a court. Lit. s. 50.

[*](E) JOINTURE [OR OTHER PROVISION.]

(E 1.) When it shall be a bar to dower.

By common law, a jointure made to a wife after or before marriage, was [*515] [*516]

not a bar to her dower; for a title to a freehold shall not be barred by a collateral satisfaction. Co. L. 36. b. R. 4 Co. 1.

But now, by the st. 27 H. 8. 10. where an estate hath been or shall be made in lands, tenements, or hereditaments, to a man and his wife, and the heirs of the husband, or to them and the heirs of their two bodies, or of one of them, or to them for their lives, or for the life of the wife, or to others to like uses, for the jointure of the wife; such jointress shall not have dower in any other lands which were her husband's.

So, in every case, where an estate is limited to the wife for her life, or for a greater estate, solely or jointly with her husband, which shall take effect in possession or profit immediately upon the death of the husband, it shall be a good jointure. Co. L. 36. b.

Though it be limited to the wife solely for her life, or to the husband for life, and afterwards to the wife in remainder (after the death of her husband) for life: for the cases mentioned in the statute are only for example, R. 4 Co. 2. a. Dy. 228.

Or, to husband and wife, and the heirs male of their bodies. 4 Co. 2. b. R. Dy. 96.

Or, to the wife and her heirs in fee-simple. R. 4 Co. 3. b. R. per three J. two cont. Dy. 248. a.

So, though it be limited to the wife with a condition annexed: for if the condition was unreasonable, it need not be accepted; and if it be accepted, it is the wife's fault if she breaks it. R. 4 Co. 2. b. Semb. 1 Leo. 311.

Though it be a condition in law; as, if the limitation be *durante viduitate*: for this is an estate for her life, if she pleases. 4 Co. 2. b.

[A conveyance must be to the wife herself, and not to trustees, in order to make the provision a jointure in point of law. M. 1739, 1 Atkyns, 561.]

So, though the estate be limited to the use of the wife: which is executed by the statute. Mo. 28.

Or, the husband, or his father, makes a feoffment upon condition to enfeoff the wife. Mo. 28.

So, a devise to a wife for life, in tail, &c. if it be expressed for her jointure, or in satisfaction of her dower, shall be a bar of dower. R. 4 Co. 4. a. Co. L. 36. b.

So, an estate limited to a wife (otherwise than by will) may be averred to be for her jointure, if it has the requisites of a jointure; though it be not so expressed. R. 4 Co. 3. Vide Ow. 33.

So, a devise, which has words tantamount, though it is not expressed for a jointure, shall be a bar. Lut. 737.

{ A devise will bar the right of dower, where the implication that the wife shall not have both the devise and dower, is strong and necessary; or where the devise is entirely inconsistent with the claim of dower; or where it would prevent the whole will from taking effect. Kennedy v. Nedvow, 1 Dall. 418. Vide Duncan v. Duncan, 2 Yeates, 302. Creacraft v. Dille, 3 Yeates, 79. S. C. Addis. 350. Hamilton v. Buckwalter, 2 Yeates, 289. }

So, if a jointure be before marriage, she cannot waive it, and claim dower. R. 4 Co. 3. a.

[The devise of an estate to a wife, which is larger than her dower, is not of course in satisfaction of her dower. 2 Atk. 427.]

[And it is not a sufficient reason to make it a satisfaction that the husband has made a residuary devise in favour of another. 2 Atk. 427, n.]

[*][But under particular circumstances, such a devise shall be taken to have been intended as a satisfaction. 2 Atk. 427. a.]

[It shall be taken to have been intended as a satisfaction where it would be inconsistent with the disposition of the will that the widow should take both the estate devised and her dower. Ibid.]

[Where *any thing* given by a will is intended to be in lieu of dower, the widow must give up *every thing* she is entitled to under the will, if she insists upon her dower. 3 Atk. 436. Semb. Ambl. 466.]

[By disposing of all his estates, subject to an annuity to his wife, the man must be intended to have meant that the annuity should be in satisfaction of dower. Ambl. 466. Ibid. 730.]

[So, where a man gives all his estates to trustees on particular trusts, he must be supposed to have intended that what he gave his wife by the will should be in lieu of dower, because dower would put her in possession of some of the estates. Ambl. 682.]

[Wherever there is no fund for both, a particular gift to a wife by will and her dower, the gift shall be intended to be in lieu of dower. D. Ambl. 683.]

(E 2.) When not.

But by the st. 27 H. 8. 10. if a woman shall have a jointure made her after marriage, unless by act of parliament, she may refuse her jointure, and demand her dower at common law.

Though before marriage an estate was limited to her in part of her jointure, and after marriage another for her whole jointure. R. 4 Co. 3. a.

What shall be a waiver, vide in Baron and Feme, (S 4, &c.)

[Jointure is not a bar to dower, when the original agreement is not in writing, or if the husband is an infant. M. 8 G. 2. B. R. H. 72.]

{ It seems, that a jointure is not a bar to a claim for dower, unless it secure to the wife a freehold estate in lands, for her life, at least; and which shall take effect in possession and profit, immediately on the death of the husband: Thus, where a man covenanted with his wife that she should have an annuity out of his estate, in consideration whereof, she covenanted not to demand her dower, it was resolved, that she was still entitled to dower. *Hastings v. Dickinson*, 7 Mass. Rep. 153.

So, it seems, that a release of dower, by an infant female, will not bar her right of dower, although a sum of money, the consideration of the release, was paid to her after the death of her husband. *Shaw v. Boyd*, 5 Serg. & Rawle, 309. }

By the st. 27 H. 8. 10. if any woman be lawfully evicted of her jointure, or any part of it by entry, action, or by discontinuance of her husband without fraud, she shall be endowed of as much of her husband's lands of which she was dowable, as she was evicted of.

So, if evicted for part in the life of the husband, she shall be endowed for so much, though she accepts the residue of the jointure. R. Mo. 717.

So, if part was entailed, and the issue entered, and was in ward to the king. R. Mo. 721, 2.

But she shall be endowed only for life, though she be evicted of an estate-tail, or in fee. 4 Co. 3. b.

Nor, shall she be endowed, if she joins with her husband in a fine of her jointure. Co. L. 36. b.

So, it shall not be a jointure to bar dower, if the estate limited to the wife does not take effect to her in possession or profit, immediately upon the death of the husband: as, if it be limited to the husband for life, afterwards

to B. for life, afterwards to the wife for life; though B. dies in the life of the husband. Co. L. 36. b. R. 4 Co. 2. b.

Or, to B. for life in possession, and afterwards to wife for life. 4 Co. 2 B.

So, if it be to the wife for the life of another, or for two or three lives, it is not a jointure. Co. L. 36. b. 4 Co. 3. a.

Or, for a hundred, or a thousand years. Co. L. 36. b.

So, if it be limited to A. and his heirs, in trust for the wife for her life, it is not a jointure. Co. L. 36. b.

[*]Or, by bargain and sale upon trust to make a jointure. Mo. 28, 9.

So, if it be limited in satisfaction of part of her dower, it shall not be a jointure. Co. L. 36. b. 4 Co. 3. a.

So, if an estate to husband and wife and their heirs, upon condition, be averred for a jointure; the settlement, without other circumstances, is not a proof of it. R. 1 Leo. 311.

So, a devise cannot be averred for a jointure, if the words of the will do not import it. R. 4 Co. 4. a. R. Lut. 737.

{ Vide Kennedy v. Nedrow, 1 Dall. 418.

Dower cannot be barred by a collateral recompence; and a devise simply, is to be taken as a benevolence, and the devisee deemed a purchaser. Blackford v. Kennedy, and Kennedy v. Wister, cited in 1 Dall. 418.

Where a devise by the husband is not expressed to be in lieu of dower, and no intention to bar the wife, can be collected from the whole will, she will be entitled to dower. Evan's Les. v. Webb, 1 Yeates, 424. Webb v. Evans, 1 Binn. 565.

And it seems, that if the wife takes a much larger estate under the will, than her dower, yet if it be not expressed to be in lieu of dower, it shall be no bar. Evan's Les. v. Webb, 1 Yeates, 425. }

When an alienation of a jointure shall be a forfeiture, or not, vide in Forfeiture. Vide Discontinuance, (A 5, 6.)

[(E 3.) When the wife shall be put to her election.]

[When a jointure is made after marriage, the wife shall be put to her election, whether to take the jointure or her dower, for she cannot have both. Vide supra, (E 2.)]

[So, if the husband make a devise in favour of the wife, and express it to be in satisfaction of her dower. Vid. Ambler, 468. 682. 730.] { Vide Van Orden v. Van Orden, 10 Johns. Rep. 30. Larrabee v. Van Alstyne, 1 Johns. Rep. 307. }

So, if he has disposed of his property in such a manner, that the devise is inconsistent with the dower: as, where he gave her an annuity out of his freehold estates, and subject to that annuity devised all his freehold estates to other persons. Ambler, 468.] { Vide Herbert v. Wren, 7 Cranch, 370. }

[So, where he gave an annuity to his wife, and subject to that annuity gave his lands to trustees upon other trust. Id. 682.]

[So, though it appear that the dower is of more value than the annuity. Id. 730.]

(F) HOW A WIFE SHALL LOSE HER DOWER.

(F 1.) By attainder.

By common law, the wife shall lose her dower, if her husband was attainted of high or petit treason. Co. L. 37. a. 41. a. Vide ante, (A 2.)
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[An erroneous judgment against the husband for treason, until regularly reversed, deprives the wife of dower. 7 T. R. 465.]

So, if he was attainted of a felony, above petit larceny. Co. L. 37. a. 41. a.

And that, as well dower *ad ostium ecclesiæ, ex assensu patris*, or by custom, as dower at common law. Co. L. 37. a. 41. a.

And dower against the feoffee of her husband before the treason or felony committed, as well as against the king, or lord by escheat. Co. L. 41. a. R. per all the judges, Dy. 140. b. R. 1 Leo. 3. Sav. 54.

But a wife shall not be barred of her jointure, if her husband be attainted of treason or felony. Co. L. 37. a.

So, by the st. 1 Ed. 6. 12. and 5 Ed. 6. 11. the wife shall have dower, though her husband be attainted for murder, or other felony. Co. L. 37. a. 41. a. Vide ante, (A 2.)

{ And a widow of a person placed on the confiscation list, shall be entitled to dower. Mongin v. Baker, 1 Bay, 71.

So, if the husband's estate has been confiscated, the widow shall be endowed. Wells v. Martin, 2 Bay, 20. Sewall v. Lee, 9 Mass. Rep. 363. Palmer v. Horton, 1 Johns. Cas. 27. Hogle v. Stewart, 8 Johns. Rep. 81. 2d edit. }

(F 2.) By elopement.

By st. W. 2. 13 Ed. 1. 34. if a wife willingly leave her husband, and go away and continue with her adulterer, she shall be barred for ever of action to demand her dower if she be convict thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him. (Vide Co. L. 32. a. b. 2 Inst. 435. 1 Rol. 680. P.)

[*][Secus her jointure; and a court of equity will enforce the specific performance of articles executed previous to marriage, providing a jointure for her. 1 Ball & Beatty, 203.]

But it will not assist her in recovering property settled to her separate use. Dick. 321. 806.]

(G) REMEDY FOR DOWER.

(G 1.) Right of dower.

☞ A writ of right of dower lies, when a wife has dower of part in the same vill: for then she cannot have dower *unde nihil habet* against the same tenant. Reg. 3. a. F. N. B. 8. C.

But it does not lie where a wife loses the land which she holds in dower, by default: for by the st. W. 2. 4. she shall have a *quod ei deforceat*; and before, she had no remedy but by a writ of disceit, if she was not summoned. F. N. B. 8. D.

Or, if she loses in an assise, or other action: for she has no remedy but by attain. F. N. B. 8. D.

Nor, in any case where she ever had possession of her dower by assignment, or otherwise. Qu. F. N. B. 8. D. E.

A writ of right of dower lies of a third part or of a moiety, according to the usage. Reg. 3. b. F. N. B. 8. H.

And shall be directed to the heir if he has a court, or his guardian. Reg. 3. a. F. N. B. 7. E. 8. C. K.

And if by reason of his poverty, he has not a court: to the lord of the fee. Reg. 3. a.

Since the st. *quia emptores terrarum*, if the husband aliens the whole in fee, it shall be directed to the feoffee. F. N. B. 7. F.

If he aliens the whole in tail, or for life, it may be sued in C. B., suggesting *quod dominus remisit curiam*: for he in reversion has but a seignior in gross, and cannot hold a court. F. N. B. 8. A. B.

And where the lord cannot hold a court, C. B. will proceed upon such writ *quia dominus remisit curiam*, though the assent of the lord cannot be proved. F. N. B. 8. B.

Yet if the lord has a court, and a writ be in C. B. *quia dominus*, &c. a prohibition lies to the justices of C. B. Qu. F. N. B. 8. B. Vide Droit, (C 2.)

And if the husband has not aliened the whole, the writ shall be directed to the heir, or his guardian. F. N. B. 7. F. 8. A.

If the heir will not do right, the demandant may remove the plaint out of his court by tolt to the county, and out of the county, by pone to C. B. without any cause in the writ. F. N. B. 7. E. Vide Droit, (B 5.)

So, the tenant, with cause, may remove it out of the court of the heir or lord to C. B. by recordari, or out of the county by pone. F. N. B. 7. E. Vide Droit, (B 6.)

The process in the court of the heir is a precept in nature of a summons, grand cape, and petit cape. F. N. B. 8. F.

After the plea removed into C. B. the process shall be grand cape and petit cape. F. N. B. 8. F.

[*](G 2.) *Dower unde nihil habet.*

Dower unde nihil habet is a writ of right in its nature; and lies in all cases, where a woman has a right to dower, except where she has part from the same tenant in the same vill, where she now demands it. Vide F. N. B. 8. C. 147. E. 148. A, &c.

{ This writ cannot be maintained against a tenant for years; but ought to be brought against a tenant of the freehold. *Miller v. Beverly*, 1 Hen. & Munf. 368. }

[(H) RELATIVE TO THE TENANT IN.]

[Tenant in dower may work an open mine in the land assigned, though not specifically mentioned in the assignment. 1 Taunt. 402.]

[(I) RELATIVE TO CONVEYANCES OF LANDS HELD IN.]

[The possession of tenant in dower renders inoperative as against strangers quoad the lands held in dower, a fine levied by the heir or remainderman. 2 N. R. 1.]

PLEADING IN DOWER. Vide PLEADER, (2 Y 1. &c.)

ADMEASUREMENT OF DOWER. For admeasurement of dower, vide the st. W. 2. 7. Co. L. 39. a. 2 Inst. 367. &c. F. N. B. 148. F. &c.

Concerning dower in equity, vide Chancery, (3 E 1, 2.) Vide also Copyhold, (K 2.)—Waste, (F 2.)

DRAWER.

DRAWER OF A BILL OF EXCHANGE. Vide MERCHANT, (F 4, 12.)

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(A) RIGHT TO LAND.

Right is to the possession, or to the property of lands, or to both. Co.
L. 266. a.

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(B) WRIT OF RIGHT. RIGHT PATENT.

(B 1.) When it lies.

A writ of right is either properly so called, or such in its nature. Co. L. 158. b. Vide Action, (D 2.)

A writ of right is the highest of all real actions, and the last remedy for the recovery of lands and tenements. Co. L. 158. b. F. N. B. 1. A.

A writ of right, properly so called, is either patent, or close.

When it is directed to the lord of whom the lands are holden, it is patent, to do right in his court. F. N. B. 1. F.

[*]But it shall be close, 1. When it is for lands *in capite* by *præcipe in capite*. Vide post, (C 1.)

2. When brought in C. B. for lands holden of another lord, *quia dominus remisit curiam*. Vide post, (C 2.)

But when in London for lands there, it shall be patent. F. N. B. 6. B. Vide post, (D).

3. When in antient demesne for lands which are antient demesne, it shall be close. Vide Antient Demesne, (G 1, &c.)

A writ of right patent lies for lands and tenements only by tenant in fee, against him who is tenant of the freehold. F. N. B. 1. B. E. { Vide Green v. Liter, 8 Cranch, 229. }

[To maintain a writ of right, the demandant must shew an actual seisin, either in himself or his ancestor, by taking the esplees or profits of the land. 1 H. B. 1.]

As, if tenant in fee dies seised, and a stranger abates; the heir may have right patent, or *mort d'ancestor*. F. N. B. 1. C. D.

Or, if a man seised in fee loses by default in a *præcipe quod reddat*; he may afterwards have right patent. F. N. B. 1. D.

So, if he loses by verdict in a *præcipe quod reddat*. F. N. B. 5. M.

Or, if the demandant be barred in any other real action, he may afterwards have a writ of right. F. N. B. 5. N.

So, if the demandant be barred by the statute of limitations in all inferior actions.

So, if he loses by default in a writ of right before the mise joined, he may have a writ of right *de novo*. F. N. B. 5. N.

Right patent lies of all lands and tenements; as, of a house, meadow, piscary, rent, &c. F. N. B. 1. L. 2. C. 6. A.

Of a passage across a water, and pasture for so many cattle certain. F. N. B. 1. L.

And of so many acres *jampnor. et bruer*. is well, without saying so many acres of each. 1 Leo. 169.

(B 2.) When not.

But it does not lie for tenant for life. F. N. B. 1. B.

Or, for tenant in tail, or frank-marriage. F. N. B. 1. B.

Or, by a parson, vicar, prebendary, &c. F. N. B. 5. C.

So, it ought not to be brought of an advowson, or common, &c. F. N. B. 1. B.

Nor, of an office; for an assise does not lie of it by the common law, but a *quod permittat*. R. 1 Leo. 169. 2 Leo. 36.

Nor, *de pomario*: for it is not named in the register, and it is included in the word *gardinum*. 1 Leo. 169.

So, it does not lie against him who has not a freehold at least: as, against tenant for years. F. N. B. 1. E.

Or, against tenant by statute merchant, staple, or *elegit*. F. N. B. 1. E.

So, if the demandant or tenant be barred by judgment after the *mise* joined in a writ of right, it shall be final; and he shall never have another writ of right. F. N. B. 5. N.

Though the judgment be upon a nonsuit, or default. F. N. B. 5. N.

[*](B 3.) How sued.—To whom directed.

A writ of right patent shall be always directed to the lord of the manor of whom the lands are holden, or his bailiff; and shall command him *quod rectum teneat* for such land, &c. F. N. B. 1. F.

And it is in the nature of a commission to him, to do right in his court. F. N. B. 1. F.

If land be holden of another person than the king, the writ shall be directed to the lord himself if he be in the kingdom; otherwise to his bailiff. F. N. B. 1 G. H. Mo. 1.

If it be holden of the king; as, of an honour, manor, or in burgage; it shall be directed to his bailiff. F. N. B. 1. I. Mo. 1.

If it be holden of a bishop, abbot, &c. after election and before consecration, it shall be directed to his bailiff. F. N. B. 1. F. 2. E.

So, if land were in the king's hands in the time of the vacation, by reason of ward, &c. or in the hands of the patentee of the ward, &c. it should be directed to the bailiff of the manor. F. N. B. 2. A. E.

So, if the lord has no court for the poorness of his manor, it shall be directed to the lord paramount. F. N. B. 2. A.

So, if the lord refuses to hold his court, there shall be a writ to him to do it; and upon that an alias, pluries, and attachment. F. N. B. 3. E.

(B 4.) In what form it shall be.

A writ of right patent expresses by what services the land is holden. F. N. B. 1. I.

So, it ought to mention the several particulars in the order prescribed by the register. F. N. B. 2. C.

A writ may be sued against divers persons together, though they hold severally. F. N. B. 2. D.

The writ shall be brought by the demandant to the steward of the court, who makes an entry, and returns it to him.

And the original writ of right patent remains always with the demandant, and not with the steward of the court, or the sheriff. F. N. B. 4. D.

(B 5.) How removed.—By tolt.

The plaintiff may remove right patent by tolt into the county-court, if it be delayed in the lord's court. F. N. B. 3. F.

So, the plaintiff may remove right patent out of the county court into C. B. by *recordari* or *pone*. F. N. B. 4. A. B. But semb. that it shall be by *pone* only. F. N. B. 4. C.

And this without cause expressed in the writ. F. N. B. 4. B.

But the plaintiff cannot remove right patent out of the lord's court, by *recordari*, *per saltum* into C. B. without having a tolt to remove it first into the county court. F. N. B. 4. A.

So, the tenant cannot remove right patent by tolt into the county court, F. N. B. 4. A.

[*](B 6.) By *recordari*.

So, the tenant may remove right patent, for cause, directly out of the lord's court into C. B. by *recordari*. F. N. B. 4. A. C.

As, if the bailiff of the court favours the demandant. F. N. B. 4. A. B.

So, if the tenant pleads a foreign plea, or bastardy. F. N. B. 4. B.

Or, joins the mise upon the grand assise. F. N. B. 4. B.

[*Recordari* delivered after interlocutory, and before final judgment, stops proceedings in that court; and the officer must obey the writ, though his fees are not paid. P. 1 G. 3. 2 B. M. 1151.]

And if the lord or sheriff will proceed after such plea, the tenant may have a prohibition; and upon that an alias, pluries, and attachment. F. N. B. 4. E.

So, the tenant may remove right patent out of the county court, by *pone* for cause. F. N. B. 4. D.

[The writ of *re. fa. lo.* stays all further proceedings in the county court, though delivered after interlocutory, if it be before final judgment. 2 Burr. 1151.]

[A writ of *recordari* virtually includes a summons to both parties to appear on the day prefixed. 1 T. R. 371.]

[(B 7.) Proceeding in, &c.]

[*Course of proceeding in.*—The mode of proceeding in a writ of right cannot be changed, even with consent. 1 B. & B. 192.]

[*Declaration in.*—In a writ of right it is necessary to state to the court, that the ancestor from whom the demandant derives title was seised of the premises in right, as well as in his demesne as of fee. 5 East, 272. 1 Smith, 543. 2 B. & P. 570.]

[If, in counting in a writ of right, one through whom title is derived, is improperly to be heir to her brother, who, it appears by the record, had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister, as heir to her brother, is fatal. 2 B. & P. 571. 5 East, 272. 1 Smith, 543.]

[In stating the descent in the count of a writ of right to several as nieces and co-heirs, the manner in which they are nieces must be shewn. 3 B. & P. 453.]

{ All the pleadings must be in writing, and at full length; therefore where the tenant pleaded in these words, "usual plea," after verdict for the defendant, a repleader was awarded. *Taylor v. Huston*, 2 Hen. & Munf. 161.

If it be stated in the record of proceedings, that the demandant "replied generally," the court after verdict, will intend, that a general replication in writing was filed. *Tuberville v. Long*, 3 Hen. & Munf. 309.

The count must set forth the boundaries of the land; and any omission in this respect will be ground of error, even after verdict. *Beverly v. Fogg*, 1 Call, 484.

But a reference to boundaries as by a survey made in the cause, will be sufficient. *Tuberville v. Long*, 3 Hen. & Munf. 309.

A count describing the land demanded, as a certain number of acres part

of a larger tract, setting forth the boundaries of the larger tract, is sufficiently certain, after verdict. *Lovell v. Arnold*, 2 Munf. 167. }

[*Summons in*.—The *nisi prius* clause may be inserted in the summons, in a writ of right, requiring the four knights to appear and make election of the grand assize. And, if from the omission by the demandant, they are forced to come up to Westminster, the court will not compel them to be sworn, unless he undertakes to pay their expences; but not the expences of the sheriff. 1 Taunt. 415.]

[The court will not assist the demandant in a writ of right; and therefore will not allow him to quash a writ of summons, which has been irregularly executed. 1 Mar. 602.]

[*Evidence in*.—In a writ of right, forty years undisturbed possession is sufficient to rebut presumptive evidence of a seisin in fee, in the person under whom the demandant claims; or at least from which to presume a conveyance of the premises to the tenant. 1 Mars. 68. 5 Taunt. 326.]

[*][*Costs in*.—The statute for judgment, as in case of a nonsuit, does not extend to a writ of right, so as to give costs to the tenant. 2 Blk. 1093.]

[*New trial in*.—No new trial shall be granted in a writ of right, except the verdict be flagrantly wrong. 2 Blk. 941.]

[*Amendment in*.—It is an established rule, not to amend the court in a writ of right, unless on very particular grounds. 3 B. & P. 453. 1 N. R. 64. Id. 233.]

[*Discontinuing of*.—The demandant in a writ of right, will not be allowed to discontinue. 1 N. R. 64. 2 N. R. 429.]

(C) RIGHT CLOSE.

(C 1.) *Precipe in capite*.

So, if land be holden of the king *in capite* the writ of right shall be close, and returned into C. B. F. N. B. 5. G.

And this is of as high a nature, and lies only by tenant in fee, in the same cases as right patent. F. N. B. 5. G.

But if a *præcipe in capite* be sued in C. B. when the land is not holden of the king, the lord may have a writ out of chancery to surcease the suit, if it appears that the tenure is of another person than the king. F. N. B. 3. D.

Or, a writ to the justices of C. B. to surcease. F. N. B. 5. B.

Yet the tenant himself cannot plead that the tenure is not of the king; but only shall take it by protestation. F. N. B. 5. L.

As to right close in antient demesne, vide Antient Demesne, (G 1, &c.)

(C 2.) *Quia dominus remisit curiam*.—When it lies.

So by licence of the lord, a man may sue a writ of right in C. B., and then the writ shall be close, and directed to the sheriff. F. N. B. 2 F.

And such licence may be given before, or after the writ purchased. F. N. B. 2 F.

And the letter of licence shall be certified into chancery. F. N. B. 3 A.

So, a man may sue a writ of right returnable in C. B., with this clause after the teste, *quia dominus remisit curiam*, though no licence be given; for it is not traversable: and this is the proper original in a writ of right in C. B. F. N. B. 2 F. 3. B.

So, if this clause be omitted, where licence is afterwards given, it is sufficient. F. N. B. 2. F.

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So, if this clause is inserted, it is well though the lord never remitted his court. F. N. B. 3 B.

Though the land was holden of him in gross, and the lord had not a court; for then there is the more reason that the writ should be sued in C. B. F. N. B. 3. C.

But this cannot be where the land lies in Durham. Semb. 1 Bul. 160.

[*](C 3.) How it shall be proceeded upon.

After the original sued in right *quia dominus remisit curiam*, the tenant ought to be summoned. Vide Booth of Real Actions, 92.

If the suit was commenced in the lord's court, it ought to be removed by tolt, &c. 1 Semb. Bul. 159, 160.

If the tenant be summoned, the sheriff returns his writ.

At the fourth day after the day of the return, the tenant may be essoigned. Vide Booth of Real Actions, 92.

And thereupon the demandant ought to adjourn the essoign for fifteen days; otherwise he shall be nonsuited. Ibid.

If the tenant does not appear at the return of the summons, nor be essoigned, a grand cape issues against him. Ibid.

If he does not appear at the return of the grand cape, judgment final shall be against him. Ibid.

So, if he does not appear at the day given by the essoign, though there be no grand cape. Ibid.

If the tenant appears at the day of the summons, or at the day given by the essoign, he may have a writ of view. Vide Booth of Real Actions, 92, 3.

And at the return of the writ of view, he may have another essoign. Vide Booth of Real Actions, 93.

And at the day of return of the view, or the day by the essoign, he may imparl. Ibid.

(C 4.) The count, &c.

If land be holden of the king *in capite*, in a writ of right *quia dominus remisit curiam*, &c. after appearance, the demandant ought to count.

The count may allege *esplees* in the demandant or his ancestor. F. N. B. 5 M. Vide F. N. B. 5 D.

[And a seisin in the ancestor means only a seisin in the person from whom there is a descent. So, where the demandant claimed as heir to the devisee under a will, who had never been seised of the esplees, it was adjudged that he could not recover. C. P. E. 28 Geo. 3. 1 H. Bl. 1.]

If the writ be upon his own seisin, it ought to be within thirty years. 1 Bul. 162.

If upon the seisin of his ancestor, within sixty years is sufficient. 1 Bul. 162.

After the count, the tenant may demand a view. Vide Booth of Real Actions, 94.

And after the view he may imparl. Ibid.

(C 5.) The plea in right *quia dominus remisit curiam* mise upon the mere right.

If the tenant pleads to the count, he shall plead to be tried by battel, by the grand assise, or by a common jury. Vide Booth of Real Actions, 95.

If he joins the *mise* upon the mere right, he may defend in battel, *per corpus liberi hominis sui*. Vide Battel, (A 2.)

Or, may put himself on the grand assise. Vide Battel, (A 3.)

[Every thing may be given in evidence upon this issue but collateral warranty. C. P. E. 13 Geo. 3. 3 Wils. 419. Brooke, tit. Droit, 48. Booth, 98. 106. 112. 115.]

[*]If the *mise* be put upon the grand assise, it shall be joined without reply by the demandant. Vide Booth of Real Actions, 96.

[The court will not permit the *mise* to be tried by a jury, instead of by the grand assise, though both parties desire it. C. P. H. 38 Geo. 3. 1 Bos. & Pul. Rep. 192.]

But the demandant may afterwards imparl before process for the grand assise. Ibid.

And if the tenant does not appear at the day given by the imparlance, judgment shall be against him, as upon a departure in despite of the court. Vide post, (C 6.) Vide Booth of Real Actions, 96.

After the recognitors sworn, (the manner of which, vide in Battel (A 3.),) the tenant shall give his evidence first: for the affirmative is upon him. 8 Leo. 162. [Dyer, 247. pl. 75. Moor, 762. Booth, 98.]

(C 6.) Judgment.

If the demandant after the *mise* joined upon the mere right, makes default, judgment final shall be against him, viz. *quod tenens teneat terram illam sibi et hæredibus in pace versus petentem et hæredes suos in perpetuum*. Co. L. 295. b.

So, if the demandant confesses the action, or be nonsuited. Co. L. 295. b.

So, if the verdict of the grand assise be against him. Co. L. 295. b.

Though the verdict be given upon a collateral point, and not upon the right. Co. L. 295. b.

Judgment in a writ of right was final and peremptory to all strangers (as well as parties and privies) within the realm, and out of prison, discover, and of sound memory, and full age, if they did not enter, or sue an action and make claim within a year and a day. Pl. Com. 357. a. Co. L. 254. b. 262.

And this in all cases where judgment final is given, though by default, &c. Pl. Com. 357. b.

But if a default be after an imparlance to another term, judgment final shall not be given before a petit cape awarded. R. 1 Bul. 160.

{ Where the tenants are sued jointly, and a joint verdict against them, in a writ of right, on the *mise* severally joined the judgment should be joint, as well for costs as for the land. Green v. Liter, 8 Cranch, 306.

And upon the *mise* so joined, the demandant is entitled to recover, though the tenants prove that they claim under several and distinct titles, for this is pleadable in abatement only. Ibid. }

(D) RIGHT PATENT IN LONDON.

So, a writ of right patent lies in London by tenant in fee, of lands or tenements in London. F. N. B. 6. b.

And it shall be directed to the mayor and sheriffs of London. F. N. B. 6. C.

And it lies in the same cases, and the proceedings upon it shall be in the [*527]

same manner as upon other writs of right patent; without making protestation to sue as in an action at common law, as it shall be upon a writ of right close. F. N. B. 6. B. G. 7. a.

(E) WRIT IN NATURE OF A WRIT OF RIGHT.

(E 1.) The several species of it.

A writ in the nature of a writ of right lies by a lord against his tenant or another, for recovery of his services; or by the tenant against his lord, where services are encroached: or by a particular tenant for recovery of his right. Vide Action, (D 2.)

[*] If the tenant disclaims the tenure, the lord shall have a writ of right upon the disclaimer for the land. Vide post, (F).

If he refuses his rent or services, the lord shall have a writ *de consuetudinibus et servitiis*. Vide post, (G).

If he ceases for two years, and has not a distress, by st. W. 2. 21. the lord shall have a *cessavit*. Vide Cessavit.

If a villein flies out of his manor, he shall have a *nativo habendo*. Vide Villeinage, (C 1, 2.)

If any, bound by tenure or prescription, refuses to grind at his mill, he shall have a *secta ad molendinum*. Vide post, (H).

And if upon the death of his tenant, a stranger seizes the body or land of the heir, the lord shall have a writ of right of ward. Vide Guardian, (H 1.)

If his tenant dies without heir, he shall have a writ of escheat. Vide Escheat, (B 1, 2.)

If the lord encroaches services, the tenant shall have a *ne injuste vexes*. Vide post, (I).

If the lord paramount distrains the tenant paravail, he shall have a writ of mesne. Vide post, (K).

So, if a man claims common in land, the owner who has the fee, shall have a writ of *quo jure*. Vide Quo Jure.

So, if he be disturbed in his common, he shall have a *quod permittat*. Vide Quod Permittat.—Common, (I).

If tenants of lands in several adjoining vills do not know the metes or divisions, one may have against the other a writ *de rationabilibus divisis*. Vide post, (L).

If a parson, vicar, &c. be denied the right of his church, he shall have a *juris utrum*. Vide Quare Impedit, (E).

If a wife be denied her dower, she shall have dower *unde nihil habet*. Vide Dower, (G 1, 2.)

If tenant in tail be discontinued, he shall have a *formedon in descender, reverter, or remainder*.

(F) RIGHT UPON A DISCLAIMER.

If a tenant disclaims upon record to hold land of his lord; the lord thereupon may have a writ of right for recovery of the land. Vide Abatement, (F 15.)

As in replevin, if the defendant avows for rents and services, and the tenant disclaims the tenure; the lord loses the services, but shall have a writ of right for the land. Vide Booth of Real Actions, 133.

And this writ of right shall be patent, and sued in the court of the manor.

Or, may be removed by tolt in the county-court, and by pone to C. B. Vide Booth of Real Actions, 133.

But if the lord accepts his rent from the tenant after the disclaimer, it shall be a bar to a writ of right upon the disclaimer. 3 Leo. 271, 2.

But a man seised in *auter droit* cannot disclaim: as, seised in right of his wife, or in right of his church, &c. Vide Co. L. 103.

Nor, tenant for life or years, who has not a fee.

Vide Disclaimer.

[*](G) WRIT OF CUSTOMS AND SERVICES.

So, if a tenant deforces his lord of rent, or services, which he ought to have from him, the lord shall have a writ of customs and services. F. N. B. 151. C.

And this writ is a writ of right in its nature, and may be sued before the sheriff by justices, or in C. B. F. N. B. 151. B. Vide County, (C 5.)

If it be sued returnable in C. B. it is right close, and not patent. F. N. B. 151. B.

And it may be brought by tenant in fee, in tail, or for life. F. N. B. 151. B.

And against several tenants together. F. N. B. 151. F.

If it be by the lord upon his own seisin, it ought to be in the *debet et solet*. F. N. B. 151. G. I.

And shall make mention of the services and arrears. F. N. B. 151. D.

So, if it be upon the seisin of his ancestor, it shall be in the *debet* only, and omit the word *arreragiis*. F. N. B. 151. D. G. 1.

If the lord claims homage, it ought to be expressly mentioned in the writ. F. N. B. 151. L.

In this writ the tenant in fee shall join the mise, though the lord has not a fee, but a tail, or only for life: for the weakness of his estate shall not prejudice the tenant. F. N. B. 151. N.

So, if the tenant has only for life, he may pray in aid of him in remainder, who both may join the mise with the demandant. F. N. B. 151. N.

What remedy the lord shall have, if the tenant ceases the payment of his services, vide in Cessavit.

What remedy for a villein who flies out of his manor, vide in Villenage, (C 1, 2.)

(H) SECTA AD MOLENDINUM.

So, if a tenant or other person bound by prescription to grind his corn at the mill of the lord, withdraws his suit, the lord may have *secta ad molendinum*. F. N. B. 122. M.

And it shall be sued by justices in the county-court, or in C. B. F. N. B. 123. A. Vide County, (C 5.)

And it may be brought by tenant in fee, in tail, or for life. F. N. B. 123. b.

If it be by tenant in fee, it shall be in the mere right. F. N. B. 123.

If by tenant in tail, or for life, it may be in the *debet et solet*. F. N. B. 123. b.

And it lies, when a tenant is bound by tenure to do suit at a mill, though the lord may distrain for it. F. N. B. 122. M.

Or, when any person is bound by prescription to do suit in respect of his [*529]

residence in such a precinct: as, the villeins of a stranger. F. N. B. 122. M.

So, the lord may have *sectam ad furnum, thorale, &c.* F. N. B. 123. b.

The process shall be summons, attachment, and distringas. F. N. B. 123. D.

[*]If the defendant appears, he may have a view of the land, or of the mill. F. N. B. 123. C.

If after appearance he makes default, there shall be a *distringas ad judicium audiendum*; and judgment, if he does not save his default. F. N. B. 123. D.

After appearance, the demandant shall count upon tenure or prescription. F. N. B. 123. E.

To the count, the tenant may plead, *nient seisie, &c. nisi ex voluntate.* Vide Booth of Real Actions, 138.

But, *hors de son fee*, is not a good plea. Vide Booth of Real Actions, 139.

(I) NE INJUSTE VEXES.

The writ of *ne injuste vexes* shall be patent, and is a writ of right in its nature, founded upon st. M. Ch. 10. *quod nullus distringatur ad faciend. majus servitium quam debetur*: and therefore it lies where the lord has obtained more service than is due, by the payment of the tenant without coercion: for, if the lord distrains for this surplus of rent or service, the tenant shall not avoid by bar to the avowry, but he ought to have this writ, which commands the lord, *ne injuste vexes vel vexari permittas B. de libero tenemento suo quod de te tenet, nec inde ab eo exigas, &c. Consuetudines vel servitia quæ nec debet nec solet, &c.* F. N. B. 10. C.

And it lies only where the tenant and his ancestors held of the lord and his ancestors. F. N. B. 10. G.

The process is a prohibition, attachment, and distringas against the lord. F. N. B. 10. D.

The writ, which is prohibitory, has a clause *quod nisi feceris, Vic. L. fieri faciat, &c.* F. N. B. 10. D.

And therefore, if the lord, after a prohibition delivered, distrains for more rent or service than he ought, there shall be an attachment returnable in B. R. or C. B., and the tenant shall count there, and the lord shall make his defence, &c. F. N. B. 10. H.

But where the encroachment is not of rent, but of other service, as homage, escuage, &c. the tenant may avoid it upon the avowry, by traversing the tenure; or may sue a *ne injuste vexes*. F. N. B. 10. H.

(K) WRIT OF MESNE.

A writ of *mesne* lies, where there are lord, *mesne*, and tenant, and the tenant paravail is distrained by the *mesne*, and by the lord paramount; he shall have this writ, which is *viscontiel*, against the *mesne*, and shall recover his damages, and compel him to pay his services. F. N. B. 136. Vide County, (C 5.)

(L) WRIT DE RATIONABILIBUS DIVISIS.

The writ *de rationabilibus divisis* is a writ of right in its nature, which lies by him who has land in a vill or hamlet, against him who has land near him in another, to ascertain the limits of the vills, and by consequence of the lands, which were not before known. F. N. B. 128. L. N.

And it lies by tenant in fee against tenant for life. F. N. B. 128. O.

[*]So, by tenants in common of one vill jointly against the tenant of the other. F. N. B. 129. A.

So, against several tenants which have lands in another vill in severalty or in common. F. N. B. 129. E.

But it does not lie by tenant in tail, or for life. F. N. B. 129. C.

Nor, by a parson of a church. F. N. B. 129. C.

Nor, by one joint-tenant, or parcener, without his companion; for joint-tenancy, &c. is a good plea. F. N. B. 129. D.

The writ is *viscontiel*, in which the plaintiff shall make a plaint in the nature of a count, before the sheriff, who by precept shall warn the defendant, and then the plaintiff shall count and the defendant shall answer in the county-court; and if he does not deny, the sheriff shall make division by metes and bounds. F. N. B. 128. P. Vide County, (C 5.)

Or, the defendant may remove it for cause. F. N. B. 128. Q.

So, if the defendant joins the mise upon the mere right, and puts himself upon the grand assise, the plaintiff ought to remove it. F. N. B. 128. Q.

And then the plaintiff shall count in C. B. and the defendant may join the mise upon the grand assise, or battel, F. N. B. 128. R.

And summons and severance, and view shall be allowed. F. N. B. 129. C.

If tenants in common join, they shall make title and allege the esplees severally; and the defendant shall make defence against them severally. F. N. B. 129. A. B.

(M) CURIA CLAUDENDA.

(M 1.) When it lies.

The writ *de curia claudenda* lies by a tenant of a freehold against another tenant of a freehold of land adjoining, who will not inclose his soil against him as he ought. F. N. B. 127. H.

And it lies by justices in the county-court, or in C. B. F. N. B. 127. G. H. Vide County, (C 5.)

Or, it may be removed out of the county court into C. B. by the defendant for cause, or by the plaintiff without cause. F. N. B. 127. I.

The process shall be summons, attachment, and distringas. F. N. B. 128. D.

If the defendant appears, the plaintiff in his court shall shew the certainty of his land, and of the adjoining land of the defendant. F. N. B. 128. E.

And ought to allege, that the defendant ought to inclose by prescription, &c. F. N. B. 128. E.

If the defendant makes default after appearance, a distringas goes instead of a petit cape. F. N. B. 128. D.

And if he makes default at the return of it, a writ of enquiry goes for damages, and a distringas to make the reparation. F. N. B. 128. D.

And it lies for not inclosing land in an open field, as well as for not inclosing a curtilage, garden, &c. R. Mo. 32.

It lies by the vendee, where the vendor sells two closes adjoining to another not severed, and does not make an inclosure. Per two J. two cont. Mo. 775.

[] But *curia claudenda* does not lie by tenant for years, or any other who has not a freehold. F. N. B. 128. B. Dy. 38. b.

Nor, by a commoner. F. N. B. 128. C.

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Nor, against any, if his land does not adjoin to the plaintiff's land. F. N. B. 128. B.

And therefore the defendant to a *curia claudenda* may plead non-tenure. Or, may traverse the prescription.

When an action on the case lies for not inclosing, vide in Action upon the Case for Negligence, (A 3.)

(M 2.) Who shall be bound to inclose.

A man may be bound by prescription to inclose his land against another.

So, if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to inclose at his peril, to prevent damage by his cattle to the other 150 acres: for if his cattle escape thither, they may be distrained damage-feasant. R. Dy. 372. b.

So, the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres at his peril. Dy. 372. b.

DRUNKENNESS.

Vide JUSTICES OF PEACE, (B 28.)

DUEL.

Vide BATTEL, (B)

DUKE.

Vide DIGNITY, (B 2.)

DUM FUIT INFRA ÆTATEM.

(A) THE NATURE OF WRITS OF ENTRY. p. 533.

(B) DUM NON FUIT COMPOS MENTIS. p. 534.

(C) WRIT OF ENTRY AD COMMUNEM LEGEM. p. 534.

(D) WRIT OF ENTRY IN CASU PROVISIO. p. 534.

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[*](F) CUI IN VITA. p. 534.

(G) CUI ANTE DIVORTIUM. p. 534.

(H) WRIT OF ENTRY IN THE QUIBUS, OR IN NATURE OF AN ASSISE. p. 535.

(A) THE NATURE OF WRITS OF ENTRY.

All writs of entry into lands or tenements shew by what means the tenant entered, and what cause the demandant has to demand the possession. Vide Booth of Real Actions, 172. Vide Enfant, (C 4.)

Writs of entry are founded upon the entry of the tenant after an alienation, disseisin, or intrusion. Vide Booth of Real Actions, 172, 173, 174.

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A writ of entry lies upon an alienation by a person incapable : as, a *dum fuit infra ætatem*, upon an alienation by an infant. Vide *Enfant*, (C 4.)

Dum non fuit compos mentis, upon an alienation by an idiot, *non compos*, &c. Vide *Idiot*, (D 5.) Vide post, (B).

Or, upon an alienation by a particular tenant ; as, after his death there lies a writ of entry *ad communem legem*. Vide F. N. B. 207. G. Vide post, (C).

And by the st. of Glo. 7. a writ of entry *in casu proviso* lies upon an alienation by tenant in dower, in her lifetime. Vide F. N. B. 205. M. Vide post, (D).

And by the st. W. 2. 24. a writ of entry *in consimili casu*, upon an alienation by any other particular tenant. Vide F. N. B. 207. D. Vide post, (E).

Or, upon an alienation by a husband seised in right of his wife : as, a *cui in vita* by the wife herself. Vide *Baron and Feme*, (I 3.)

Sur cui in vita by the heir of the wife. Vide F. N. B. 193. A.

Cui ante divortium, and *sur cui anti divortium*, if husband and wife are divorced. Vide F. N. B. 204. F. Vide post, (G).

A writ of entry lies in the nature of an assise, or in the *quibus*, upon a disseisin to the demandant himself. Vide F. N. B. 191. C. Vide post, (H).

If the disseisin was to his ancestor, or the tenant claims by the disseisor, it shall be a writ of entry in the per. Vide F. N. B. 191. D.

In the per and cui, if the tenant claims by the disseisor in the second degree. Vide F. N. B. 191. D.

And if he claims after all the degrees, it shall be a writ of entry in the post. Vide *Booth of Real Actions*, 173. F. N. B. 191. C.

So, a writ of entry lies upon an intrusion after the death of a particular tenant. Vide *Booth of Real Actions*, 173. F. N. B. 203. E.

Ad terminum qui preterit, if the particular tenant detains the land after his term ended. Vide F. N. B. 201. D.

And *causa matrimonii prælocuti*, where a man detains lands given to him by a woman, upon prospect of marriage, which afterwards does not take effect. Vide F. N. B. 205. A.

[*](B) DUM NON FUT COMPOS MENTIS.

The writ *dum non fuit compos mentis* lies by the heir of him who not being of sound memory, aliens in fee, in tail, for life, or for years. F. N. B. 202. C. F.

The process shall be summons, grand cape, and petit cape. F. N. B. 203. D.

But it does not lie by the issue in tail ; for he shall have a formedon.

(C) WRIT OF ENTRY AD COMMUNEM LEGEM.

A writ of entry *ad communem legem*, lies by the heir, or him in reversion seised in fee, if tenant by the curtesy, in dower, or for life, aliens in fee, in tail, or for life. F. N. B. 207. G.

(D) WRIT OF ENTRY IN CASU PROVISIO.

So, by the st. of Glo. 7. the heir, or he in reversion, shall have a writ of entry immediately, if tenant in dower, or for life, aliens in fee, or for life ; for though upon such alienation in fee the heir, or he in remainder, might enter by the common law, yet if the entry was tolled by the death of the alienee

Writ of entry in the quibus, or in nature of an assise. 517

and a discent, he had not a writ of entry *ad communem legem* till the death of the alienor, and then the heir frequently was barred by the warranty of his ancestor; wherefore this writ was provided, called a writ of entry *in casu proviso*. 2 Inst. 309. F. N. B. 205. M.

(E) WRIT OF ENTRY IN CONSIMILI CASU.

So, by the st. W. 2. 24. *De cætero, cum in uno casu conceditur breve in consimili casu, simili remedio indigente, sicut prius fiat breve.*

And upon this statute, if tenant by curtesy aliens in fee, in tail, or for life, or tenant for life, or *pur auter vie*, aliens, &c. he who has the estate in reversion, in fee, in tail, or for life, shall have a writ of entry *in consimili casu*; though he had no remedy by the st. of Glo. 7. F. N. B. 206. F. 2 Inst. 405.

(F) CUI IN VITA.

For *cui in vita*, vide Baron and Feme, (1 3.)

(G) CUI ANTE DIVORTIUM.

So, if the husband aliens the land of his wife, and afterwards they are divorced, she shall have a *cui ante divortium* against the alienee. Vide F. N. B. 204. F.

So, since the st. 32 H. 8. 28. which makes the alienation by the husband void; for the entry of the wife is preserved only after the death of the husband. Per Dy. Mo. 58.

[*](H) WRIT OF ENTRY IN THE QUIBUS, OR IN NATURE OF AN ASSISE.

A writ of *quibus* lies, instead of an assise, by tenant in fee, or his heir, if he or his ancestor be disseised of lands, or tenements, rent, or office, &c. F. N. B. 191. C. Vide Assise.

DUM NON FUT COMPOS MENTIS.

Vide DUM FUT INFRA ÆTATEM, (B).

DURESS.

Vide JUSTICES, (S 1.)—PLEADER, (2 W 19.)

DUCHY.

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(D) WHAT PRIVILEGES BELONG TO ECCLESIASTICAL PERSONS. p. 547.

(A) THE KING.

The king is *persona sacra*; and therefore he may constitute and restrain ecclesiastical jurisdiction. Vide Prerogative, (D 9.)—Prohibition.

May dispense with the ecclesiastical laws. Vide Prerogative, (D 11, 17, &c.)

May inflict ecclesiastical censures. Vide Prerogative, (D 12. 21, 22.)

May make an appropriation without the bishop, where he himself is
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patron ; and with the consent of the patron only, where a subject is patron.
May take a resignation from a dean of his deanry, as well as the bishop ;
for he is supreme ordinary.

(B) PERSONS REGULAR.

(B 1.) The pope.—What authority was allowed to the pope.

All ecclesiastical persons are regular, or secular. Co. L. 93. b.

Regulars are those who have vowed obedience, chastity, and poverty.
Co. L. 93. b.

The head of these orders was the pope.

By the ignorance and sufferance of superstitious times, the pope antiently
had the reputation of supreme head of the English church. Hob. 146, 7.

From him all the power of ecclesiastical persons was esteemed to be de-
rived. Hob. 147.

He created and consecrated bishops.

And such creation by the pope made one a bishop *de facto*, and capable
to take the king's confirmation. Pal. 346.

But in truth all the authority of the pope was by usurpation, and void.
Hob. 146. Vide Popery.

[*]And therefore, where the pope by his authority made a provision for
benefices, it was always disallowed. Vide Provisor.

So, the pope could never make a corporation. Jon. 184.

Nor, had jurisdiction within the realm. 4 Inst. 321.

Yet some acts of the pope had the semblance and allowance of right, and
such authority was given to the archbishop by the st. 25 H. 8. 21. Vide
Prerogative, (D 20.)

(B 2.) An abbot, prior, monk, &c.—How professed.

All regulars were entered in some house of religion, as an abbey, priory,
monastery, &c. and there professed.

A man was entered into religion, by his admittance into a house of reli-
gion. Co. L. 132. a.

But he was not professed till the year of probation expired, when he had
taken the habit of his order, and vowed perpetual obedience, chastity, and
poverty. Co. L. 132. a.

(B 3.) The diversity of the orders.

There are several orders of houses of religion.

There were four orders of friars ; as, Friars Minors, Carmelites, Augus-
tines, and Friars Preachers. Co. L. 152. a.

And the friars minors comprehend the Franciscans, Capuchins, and Ob-
servants. Co. L. 132. a. 136. a.

Vide monastery.

(B 4.) The head of a convent.

The head of the convent was the abbot, or prior.

Who ought to be chosen by the convent. 2 Rol. 102.

(B 5.) The convent.

The body of the convent consisted of monks, canons, friars, or nuns. Co.
L. 136. a.

(C) PERSONS SECULAR.

(C 1.) Archbishop.

There are within the kingdom only the two archbishops, of the provinces of Canterbury and York. Co. L. 94. a. *

How elected, vide post, (C 2.)

The archbishop of Canterbury has the style of metropolitan and primate of all England. Co. L. 94. a.

The archbishop of York, metropolitan and primate of England.

York has within his province, Durham, Carlisle, Chester, and Man : Canterbury has all the others. 4 Inst. 322.

By the st. 25 H. 8. 20. the archbishops upon a *conge d' eslire* are elected, and afterwards confirmed and consecrated. Vide post, (C 2.)

Every bishop and archbishop *tenet per baroniam* of the king's foundation ; and therefore is a peer in parliament. 4 Inst. 45. 362.

The jurisdiction of the archbishop is ordinary, as every other bishop's within his diocese. 3 Lev. 212. Vide post, (C 2.)

Or, superintendant over all ecclesiastical persons within his province. 3 Lev. 212.

[*]And therefore, all ecclesiastical acts within his province are only voidable, and not void, though done when the jurisdiction belonged to a bishop, or other ecclesiastical person within his province ; as, if he grants administration when there are not *bona notabilia*. Vide Administrator, (B 5.)

Or, if he institutes to an advowson within a peculiar in his province. R. 3 Lev. 212.

So, an archbishop has a provincial power over all bishops within his province ; and may hold a court where he pleases within his province ; and in person officiate as judge. R. 1 Sal. 134.

And may deprive. R. 1 Sal. 135. Carth. 485.

Or, convene them before him for dismeanor in their function. R. Carth. 485.

(C 2.) Bishop.—How chosen.

And jurisdiction of all the bishoprics in England are of the king's foundation. and he is their patron. Co. L. 134. a. 1 Rol. 880.

And they were originally donative by the delivery of the ring and crosier. Co. L. 134. a. 1 Rol. 882. l. 25.—50. Dav. 90. 2 Rol. 102. 130. Vide Donative.

But king John granted them to be elective. Co. L. 134. a. 1 Rol. 880. l. 25.—50. Dav. 93. 2 Rol. 102, 3. Cod. Ju. Eccl. 121.

And now by the st. 25 H. 8. 20. on avoidance of an archbishopric, or bishopric within any of the king's dominions, the king shall grant a *conge d' eslire*, containing the name of the person to be chosen, and the dean and chapter, &c. shall elect the person so named, and no other. And if they delay election above twelve days after letters missive delivered, the king may by letters patent nominate whom he shall think fit to such dignity. Vide 1 Sal. 136. 2 Rol. 101.

And after such election certified under their common seal, and oath and fealty to the king, his majesty shall by letters patent signify such election, if of an archbishop, to some other metropolitan in his dominions and two bishops, or to four bishops ; if of a bishop, to the archbishop of the

province, or, if vacant, to some other metropolitan, who shall confirm the election, and invest and consecrate the person elected.

By the st. 1 Ed. 6. 2. archbishoprics and bishoprics were made donative: but that statute is now repealed by the st. 1 M. ss. 2. c. 2. and 1 El. 1. and the st. 25 H. 8. 20. revived. Co. L. 134. a. R. 12 Co. 7.

And therefore, upon the death of a bishop, the dean and chapter certified the king of it in chancery, and prayed the king's licence to elect; upon which a *conge d'eslire* goes, and they make the election, and certify it to the person elected himself, and have his consent, then to the king in chancery, and to the archbishop; and the king by his letters patent assents, and commands the archbishop to confirm and consecrate; who examines the election, and the ability of the person, and afterwards confirms and consecrates him. Jon. 160.

And there is the same proceeding when a bishop is translated, except the consecration, as when he is newly elected. R. Jon. 160. 1 Sal. 136, 7. 2 Rol. 452.

And by the st. 8 El. 1. and 39 El. 8. all archbishops and bishops of the realm are declared lawfully such. 4 Inst. 321, 2.

A bishop, though chosen, and though he has the temporalities delivered [*]to him, is not a complete bishop (unless it be upon a translation) till his consecration. 1 Rol. 888. l. 10. 2 Rol. 451.

Nor, can he do a judicial act; as, institution to a church, &c. 2 Rol. 451.

Yet he may do ministerial acts; as, a certificate of bastardy, excommunication, &c. 2 Rol. 451.

But a bishopric in Ireland is now donative. 1 Sal. 136. Pal. 27. Vide Ireland, (E.)

And the bishop shall be created by patent only. R. 2 Cro. 553. 2 Rol. 101. 130.

The jurisdiction of a bishop and archbishop, as to the punishment of offences, and the hearing and determining of causes, is derived out of the crown. Vide Prerogative, (D 9.)

And therefore, a bishop may make a layman his commissary, chancellor, or official. R. Jon. 264. Cro. Car. 258.

Or, may officiate as judge in person. 1 Sal. 134.

[The judgment of the bishop, that a candidate for a lectureship is, from inquiry made, in his opinion, an unfit person, is conclusive. 15 East, 117.]

So, though the st. 37 H. 8. 17. says, any layman married or unmarried may, being a doctor of the civil law, be a commissary, official, register, &c.; yet if he be not a doctor of the civil law, he may be a commissary, &c.; for the statute speaks in the affirmative only. R. Cro. Car. 258. R. Cro. El. 314.

A bishop is a bishop of the universal church. Vide Pal. 345.

And therefore, a bishop of Ireland, or Man, has the title of bishop here. Pal. 345.

As to grant and seizure of temporalities, Vide Prerogative. (D 23, 24, 25.)

(C 3.) Dean and Chapter.

Every archbishop, and bishop, has a dean and chapter. 3 Co. 75. a. or a chapter without a dean. 2 Rol. 453.

All deans and chapters are either antient or new. Co. L. 95. a.

In the ancient, the dean was chosen by the chapter upon a *conge d'eslire*; and the king having assented, he was confirmed by the bishop. Co. L. 95. a.

The archbishops of Canterbury and York, and the bishops of
have antient chapters.

The new chapters are, where the king has translated a prior, and convent,
&c. into a dean and chapter to a bishop ; as to the bishop of Norwich, &c.
Co. L. 95. a. 3 Co. 73, 4.

Or, when the king, upon the erection of a new bishopric, erects a new
dean and chapter. Co. L. 95. a.

By the st. 35 El. 3. letters patent for erection, &c. of a dean and chapter
are good.

And the dean in the new translations and erections is donative, and by
the king's letters patent is installed. Co. L. 95. a.

[See a very elaborate investigation on the subject of the different kinds of
deans, &c. in the notes to Co. Lit. by Mr. Hargrave, fo. 95. *et seq.*]

The dean is so called, because he has ten prebends or canons at least, of
which the chapter consists. Ibid.

And he is the head of the chapter. Ibid.

[*]And though the dean and chapter make a corporation, yet the dean
and every prebendary of the chapter, may be a corporation by himself. 10
Co. 31. b.

So, the dean may have belonging to his deanery, a church, prebend, or
other possessions. Dy. 273. a.

If a deanery be donative, and the king by letters patent grants the deane-
ry, without limiting any estate ; yet he has all the estate in him, viz. to the
dean and his successors. R. Dav. 46. a.

So, if the king limits the grant to him for life, or at will ; yet he shall have
the fee. Dav. 46. a.

The dean of a cathedral or collegiate church is perpetual, viz. for his life.

And he may be a lay as well as a spiritual man. Dy. 273. a. in marg.
Semb. cont. 2 Rol. 341. l. 10.

And his dignity is not an ecclesiastical benefice : for he has not institution,
except where it is presentative. Lind. 125.

Yet it is a spiritual promotion. 2 Rol. 341. l. 10.

A sub-dean is, either *pro hac vice*, substituted by the dean ; or perpetual,
chosen by the dean and chapter. Lind. 327.

But a rural dean is employed by the bishop and archdeacon, and is tem-
porary. Lind. 14. 79. 327.

The office of the dean and chapter is, to advise, and assist the bishop in
matters of religion, to consent to his grants, leases, &c. and to elect the bis-
hop upon a vacancy. 3 Co. 75.

The dean and chapter are a corporation.

And have capacity to take and alien, &c. as another corporation.

So, they may subsist without any lands or possessions. 3 Co. 75. b. 2
And. 167.

A dean has not a freehold till his instalment. 2 Rol. 451.

A dean may surrender his deanery to the king, by which it shall be dissolv-
ed. Dy. 273. Vide 3 Co. 75. b.

[A dean and chapter is a spiritual, and not a lay body. Lessees of Dean
and Chapter of Christ-church, Oxon's Case, H. 1725, Bunb. 209.]

Vide Chancery, (3 C).

(C 4.) Prebendary.

A prebend is *jus spirituale percipiendi proventus in ecclesia, competentes
percipienti ex divino officio cui insistit.* Lind. 144. verb. Prebendas.

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A canon is he, *qui est electus in fratrem*, and has a stall in *choro, et locum in capitulo*. Lind. 144. Dy. 294. b.

A prebend is derived out of a canonry, *ut filia ex matre; sed sine redditu non potest constitui*. Lind. 144.

But if a prebendary aliens his whole possession, he continues prebendary; for he has his stall in the choir, and his voice in the chapter. 3 Co. 75. b.

If he demises his prebend, the prebendary shall do the things proper to his function, and not the lessee.

He shall make a commissary, which belongs to him by prescription, and the lessee cannot make one. Ray. 88.

[The admission of a canon into *plenum jus* has relation back so as to perfect his title from the first. 1 M. & S. 205.]

[There is no lapse to the bishop in the case of a canonry; it is not a mere spiritual advantage. And semble, that he has no right, under [*]his visitatorial power, to appoint *pro tempore*, in default of appointment by the dean and chapter. 1 T. R. 650.]

(C 5.) Archdeacon.

An archdeacon derives his authority from the bishop, and ought to visit as subordinate to him. Hob. 16. Cod. Ju. Eccl. 1009. 2 Rol. 448.

By the canon 4to. conc. Toledo. 35 anno 630. temp. Honor. 1. it was first allowed, that a bishop *langore aut occupationibus implicatus presbiteros vel diaconos mittat, qui reddit. basilicar. reparation. et ministrantium vitam inquirant*; upon which the bishop divided the diocese into archdeaconries, and gave them commission to visit. Degs, part 2, c. 15. Cod. Ju. Eccl. 1006.

In the time of the Saxons, they had jurisdiction allowed in England. Rights of Convocation, 292.

In the time of William the Conqueror it was ordained, *quod episcopus vel archidiaconus* (who before sat with the sberiff), *placita in hundredo amplius non teneat*, but right shall be done by himself according to the canons, &c. 2 Rol. 216. l. 15. Jan. Angl. 66.

And therefore, he is now as *oculus episcopi*. 4 Inst. 339.

And may hold a court within his archdeaconry, where, by prescription, or composition, he has jurisdiction in ecclesiastical causes. 4 Inst. 339. Vide Courts, (N 9.)

By the st. 24 H. 8. 12. an appeal lies from him to the bishop; or, if he be the archdeacon of an archbishop, to the arches. Vide Prerogative, (D 13.)

(C 6. a.) Parson.—Of what a parsonage consists.

A parson is he *qui personam gerit*; viz. the rector of a parochial church. Co. L. 300. a. Vide Parson.

A rectory or parsonage consists of glebe, tithes, and oblations, established for the maintenance of a parson, or a rector to have cure of souls within the same parish.

And there need not be more glebe than the soil of the church, or church-yard.

But there ought to be some land; for if tithes only be proved, it is not a rectory. 1 Sid. 91. 3 Sal. 377.

[(C 6. b.) Dilapidations.]

[See as to the liability to make good dilapidations in the case of resignation. 2 T. R. 630.]

[Thus of a prebendary. Ibid.]

(C 7.) Who may be a parson.

Every man presented, instituted, and inducted, shall be a parson to a church; though he be an alien: for he may take a spiritual possession, not a temporal one. 2 Rol. 348. l. 20. Vide Esglise, (M).

So, an abbot, &c. though dead in law. 2 Rol. 348. l. 10.

So, one *mere laicus*; for he is parson till deprivation. 2 Rol. 348. l. 30. Vide Esglise, (M)

Or, wholly illiterate. 2 Rol. 348. l. 32.

[*](C 8.) Who not.

By the st. 13 El. 12. none shall be admitted to any benefice with cure, unless he be of the age of 23 years at least, and a deacon.

[Amended by 23 G. 2, c. 28. and 44 G. 3. c. 43.]

And none shall be a minister, or admitted to preach and administer the sacraments under the age of 24 years.

So, by the same statute, none shall be admitted to preach or administer the sacraments, unless he bring to the bishop a testimonial of his honest life and professing the doctrine of the 39 articles; and be able to give an account of his faith in Latin, according to the said articles, or have a special gift to be a preacher.

Nor, shall he be admitted to the order of deacon, unless he first subscribe the said articles.

Nor, to a benefice with cure unless he shall first have subscribed the said articles in presence of the ordinary, and publicly read the same in the church of that benefice, with declaration of his unfeigned assent to the same.

So, by the st. 13 & 14 Car. 2. 4. none shall be admitted to a parsonage, vicarage, benefice, &c. before he be ordained priest, according to the form thereby established, unless he was before in episcopal orders.

So, by the same statute, he ought to declare his unfeigned assent and consent to all things contained in the book of common prayer in two months after actual possession, or else shall be *ipso facto* deprived: and the patron may present, &c. as if dead. Vide Parson, (C).

So, a woman cannot be a parson; for the presentation, institution, and induction of her is null and void. 2 Rol. 348. l. 33. Hob. 149.

(C 9.) The interest of the parson.

The parson is seized in right of his church, and the freehold of the church, church-yard, and glebe belong to him. Co. L. 300. b. Vide post, (C 14.)—Esglise, (G 1.)

And therefore, he may sue and be sued for the right of his church. Co. L. 300. b.

So, for the benefit of his church or successor, he shall be reputed to have the inheritance *quodam modo*; and therefore, he may have waste, and declare *ad exhereditationem ecclesiæ*. Co. L. 341. a.

If his lessee aliens, &c. he may have a writ of entry *ad communem legem* after his death, or *in consimili casu* during the life of the lessee; which writs lie only for him, who has an inheritance or reversion for life. Co. L. 341. b. F. N. B. 206. F. 207. G. 49. D.

So, he shall have an *ad terminum qui præteriit*, and a *quod permittat* in the *debet*. Co. L. 341. b.

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A writ of *mesne*, or a *contra formam feoffamenti*. Co. L. 341. b.

So, he shall have a *cessavit*. F. N. B. 49. C.

And upon a grant to him and his successors, he shall have a *quid juris elamat*, a *per quæ servitia*, or a *quem redditum reddit*. F. N. B. 49. H.

So, if he be disseised, or aliens in fee, &c. his successor may have a *juris utrum*. F. N. B. 48. R.

[*]Or, if another recovers against him by default, or by verdict, when he did not pray in aid of the patron and ordinary. F. N. B. 48. R.

Or, intrudes into the rectory after the death of his predecessor. F. N. B. 49. A.

So, a parson may receive homage. Co. L. 341. b.

If a parson be disseised, he himself shall have an assise, or a writ of entry in the *per*, *cui*, or *post*, or in the *quibus*. F. N. B. 49. B.

But, properly, the fee-simple is not in the parson : but in abeyance. Lit. s. 646.

And therefore he cannot have a writ of right. Lit. s. 645.

Nor, a writ in the nature of a writ of right, as a writ of right upon a disclaimer, of customs and services, *ne injuste vexes, rationabilibus divisis, quo jure*, &c. Co. L. 341. b.

(C 10.) Vicar.—The original of vicarages.

When a church was appropriated, it was usual to endow a perpetual vicar with parcel of the rectory, to have the cure of souls.

[A vicar (*quia vicem alterius gerit*) was a name not known until the reign of king Henry III., before which the rector provided a curate, and maintained him by an arbitrary stipend. Seld. c. 12. s. 1. Ayl. Par. Jur. Can. Ang. 510. 1 H. Bl. 423.]

[But in that reign the avarice of the monks and rectors had proceeded to such lengths, that the legislature found it necessary to interfere, and it was enacted, that curates, who from being vice agents were then called vicars, should have some determinate support assigned to them, at the discretion of the ordinary, for the perpetual maintenance of the cure, and should be canonically instituted and inducted. 15 R. 2. c. 6. 4 H. 4. c. 12. Cro. Jac. 515. Seld. c. 12. s. 1. Ayl. Par. Jur. Can. Ang. 513. Mirehouse on Tithes, 10.]

And by the st. 15 R. 2. 6. and 4 H. 4. 12. the appropriation shall be void, if a perpetual vicar be not instituted and inducted into the same church and convenably endowed.

Before those statutes, the endowment of a vicarage upon an appropriation was not necessary. 2 Rol. 99.

And those statutes extend only to future time. 2 Rol. 99. 127. R. Pal. 222.

(C 11.) How created.

The parson, patron, and ordinary may create a vicarage without the king's assent. 2 Rol. 334. l. 17.

So, in time of avoidance, the patron, and ordinary. 2 Rol. 334. l. 27.

So, the parson appropriate, and the ordinary. 2 Rol. 334. l. 20. 35.

Though the appropriation be to those who have not *curam animarum* ; as, to a dean and chapter, nunnery. Plo. Com. 497. 2 Rol. 334. l. 25.

But the ordinary without the patron, cannot create a vicarage. 2 Rol. 334. l. 15.

(C 12.) Or reunited.

So, the vicarage may be reunited to the parsonage; if it be impoverished. 2 Rol. 337. l. 50.

Or, if the parsonage be impoverished. 2 Rol. 338. l. 10.

[*]And may be reunited by the parson appropriate, and ordinary, in time of vacation of the vicarage. 2 Rol. 337. l. 25. Pal. 222.

By parson, ordinary, and vicar, when the vicarage is full. Ley. 14.

So, by the pope as supreme ordinary; the parson and vicar, where, by subsequent usage, the intent appears. R. 2 Rol. 99. 127.

If the parson appropriate presents the vicar to the parsonage, with the consent of the ordinary, this reunites them. 2 Rol. 338. l. 5.

Or, presents to the vicarage by the name of parsonage. 2 Rol. 338. l. 17.

So, if the parsonage be recovered by a title paramount the endowment of the vicarage, they are reunited. 2 Rol. 338. l. 30.

And by union, the endowment of the vicarage returns to the parsonage. 2 Rol. 338. l. 8.

But a vicarage shall not be reunited by the ordinary, except for impoverishment. 2 Rol. 338. l. 12.

And, a presentation of the vicar to the parsonage, by the lessee of the parson, does not bind his lessor. 2 Rol. 331. l. 6.

Or, a presentation by any other than the parson. 2 Rol. 338. l. 22.

Or, by the king. Dub. 2 Rol. 338. l. 25.

So, after the st. 4 H. 4. 12. a vicarage shall not be dissolved. 2 Cro. 517.

Nor, after the st. 31 H. 8. 13. when the parsonage is come to a temporal hand. 2 Cro. 518.

(C 13.) Endowment.

By the st. 15 R. 2. 6. and 4 H. 4. 12. the ordinary shall endow the vicarage according to the value of the church. Vide ante, (C. 10, &c.)

[Besides this mode there were two others by which it might be endowed; first with lands by way of agreement; secondly, with a parcel of the parsonage, generally the small, and sometimes particular parts of the great tithes. Grom. 1090. Mirehouse on Tithes, 11.]

So, if the vicarage be impoverished, the ordinary may enlarge the maintenance. 2 Rol. 337. l. 30. 338. l. 1.

And there shall be a suit for it in the ecclesiastical court. 2 Rol. 337. l. 35.

And the vicar may libel there for increase of maintenance against the parson impropriate and his lessee, by the st. 32 H. 8. R. 2 Rol. 337. l. 30.

So, an endowment may be enlarged by the bishop, upon notice to all, who are interested, though a power to enlarge be not reserved upon the original endowment. Hard. 329.

So, if there be no endowment of a vicarage, equity, upon an information by the attorney-general, will compel the impropriator of the small tithes to make an allowance. R. 1 Ver. 247.

Otherwise, if there be an endowment, though small. 1 Ver. 247.

The endowment shall be construed by usage; and therefore, if a vicar be endowed *deminutis de cimis*, and he has used to have tithes of wood of the yearly value of 6s. 8d.; though wood in its nature is a great tithe, yet in respect of the small value, and the usage, the vicar shall have the tithes of the wood. R. 2 Rol. 335. l. 45.

[The vicarage being derived out of the parsonage no tithes can *de jure* belong to the vicar, except that portion which is described in his endowment, or what his predecessors have immemorially enjoyed.]

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[*][The rector is *prima facie* entitled to all the tithes of the parish, small as well as great; and the vicar, in order to take any part of them from him, must either produce an endowment or give such evidence of usage as presupposes an endowment. 2 Bulst. 27. 2 Ves. 511. Grom. 847.]

[Since courts will not presume any thing *ex parte* the vicar against the rector. Yelv. 86. 3 Atk. 497.]

[When however the vicar produces an endowment, then the situation of the parties is reversed; the *prima facie* title is in favour of the vicar; and if the rector claims any of the articles comprehended within the terms of it, the *onus probandi* is thrown upon him. In such case it is incumbent on the rector to give such clear and cogent evidence of an usage in the parish in his favour with respect to the articles he insists on, as shall narrow the terms of the endowment, and induce a presumption that the parties interested had come to some new agreement, or that some different arrangement had been made with respect to the distribution of the tithes, between the date of the endowment and the disabling statutes of queen Elizabeth. Grom. 1527.]

[An endowment therefore is not always conclusive evidence of the vicar's right against the parson, but may be narrowed or varied by subsequent usage; and if such usage occurs, the effect of it, where it is sufficient to outweigh the endowment, is properly triable at law. Grom. 1258. 7 B. P. C. 100. 4 Wood's Dec. 268.]

[Possession is a species of evidence to prove an endowment, where an express endowment cannot be produced, or to furnish ground for presuming an augmentation, where there is no express endowment. Grom. 1244.]

[Which may be also presumed from the long and continued possession of first-fruits and tenths. 12 Rep. 4. Grom. 716.]

[And where there has been no enjoyment conformably to the terms of the endowment, usage may be resorted to, to shew that a money payment has existed in lieu of what the endowment mentions. Cro. Jac. 252. 12 Rep. 4. Bunb. 262. Grom. 675.]

[And in general where a vicar proves an endowment of all the small tithes, the rector claiming any portion of them must shew some grant or agreement before the disabling statutes, without which no usage or enjoyment on the part of the rector will bar the vicar's claim to any of the tithes within his endowment. Grom. 938. 3 Wood's Dec. 146. Grom. 926. 8 Wood's Dec. 207. Mirehouse on Tithes, 11. 15.]

So, if he be endowed *de decimis garbarum*, and by usage he has always had the tithe of hay, as well as of corn. R. 2 Rol. 335. l. 30.; for an augmentation of the endowment shall be intended. Hard. 328. Pal. 222. 2 Rol. 161.

So, it shall be construed liberally: as, if a vicar be endowed of all tithes, except corn; he shall have hops, rape-seed, &c. though they be things newly sown in England. R. 2 Rol. 334. l. 40.

If he be endowed of small tithes, and arable land is afterwards converted into pasture, he shall have the small tithes of it. 2 Rol. 335. l. 23.

If endowed of all the tithes of a manor, he shall have the tithes of the freeholds, as well as of the copyholds; for they all make the manor. R. 2 Rol. 335. l. 27. Cro. El. 463. Ow. 58.

Yet a vicar shall not have tithes of the glebe, though severed after the endowment. R. 2 Rol. 335. l. 10.

[*]So, if there be no endowment, the vicar cannot claim any thing. R. Pal. 426. Vide supra.

[Even where there does not appear to be any endowment (which a vicarage may be without, Palm. 426), the small tithes having been constantly received by the vicar, there is reasonable ground of presumption that he is entitled to all modern species of small tithes. Grom. 1247.]

[But where the rector has actually time out of mind received some of the small tithes, thereby proving that the vicar could not have been endowed of all of them, the common law right being in favour of the rector, the vicar cannot, against that common law right, claim a species of small tithe which he has never enjoyed. Mirehouse on Tithes, 15.]

(C 14. a.) The interest of the vicar.

By the common law the vicar had not the freehold of the church or church yard, nor could have a *juris utrum* for his glebe, nor be named tenant to the præcipe for his glebe, without his parson. 2 Rol. 336. F. Vide Esglise, (G 1.)

[The rector may convey the glebe to the vicar. Grom. 435. Cro. Car. 169. Gibs. Cod. 661.]

But now, by the st. 14 Ed. 3. 17. a vicar, &c. shall have a *juris utrum* for lands, &c. of the vicarage, and recover in other writs, as a parson may.

And therefore, he shall have an assise. 3 Sal. 377.

So, a vicar shall have aid of the parson, patron, and ordinary. 2 Rol. 336. l. 48.

So, a vicar shall have the trees in the church yard; for he stands liable to the repairs of the church. Semb. 2 Rol. 337. l. 15.

[(C 14. b.) Curate.]

[If a rector give A. B. a title to the bishop, and thereby appoint him curate of his church, promising to allow him a salary, and to continue him in the office of curate, till otherwise provided with some ecclesiastical preferment, unless lawfully removed for any fault, he cannot afterwards remove him without cause. Cowp. 437.]

[A curacy is augmented by the mere order for augmentation made by the governors of queen Anne's bounty in the form prescribed. 11 East, 478.]

[(C 14. c.) Lecturer.]

[As to the creation of a lectureship, see 1 T. R. 331. 4 T. R. 125. 2 East, 462.]

[And whether a preferment within a curate's title. Cowp. 437.]

[(C 14. d.) Residence, &c. of Clergy.]

[See the late act of 57 Geo. 3. c. 99.]

(C 15.) What persons have cure of souls.

The parson of a parish-church has *curam animarum*.

And the perpetual vicar, who is presentative. 2 Cro. 517.

So, a parson appropriate, till a vicar be established. 2 Rol. 341. l. 50.

[*]So, the parson, where the vicar is instituted only in aid of the parson.

So, a donative of the king may have the cure. 2 Rol. 341. l. ult. Vide Donative.

So, the parson and vicar may both have the cure; the parson *habitualiter*, the vicar *actualiter*. 2 Cro. 518.

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But if a perpetual vicar be presented, the parson ceases to have the cure.
2 Rol. 341. l. 47.

So, a dean, or archdeacon, has not the cure.

So, a prebendary has not the cure. 2 Rol. 341. l. 45. Cro. El. 79.

(C 16.) Who are dignitaries.

Every promotion in the church, having jurisdiction annexed, is a dignity:
as, a deanry. Cro. El. 663.

An archdeaconry. Semb. cont. Cro. El. 663.

But a parson is not a dignitary. Cro. El. 663.

Nor, a provost. Cro. El. 663.

Nor, a chaplain, or prebendary. Cro. El. 663.

(D) WHAT PRIVILEGES BELONG TO ECCLESIASTICAL PERSONS.

By the st. M. Ch. 9 H. 3. 1. *Ecclesia sit libera, et habeat omnia jura sua et libertatis illasas.*

So, by the st. 50 Ed. 3. 1.

And this extends to all ecclesiastical persons. 2 Inst. 3.

And therefore, no ecclesiastical person shall be chosen to a temporal office: as, sheriff. Vide infra.

Nor, shall be expeditor for lands, which he has within a level, for sewers. Per two J. 1 Mod. 282. 1 Lev. 303.

Nor, shall be constable, reeve, beadle, &c.

Nor, shall be bound to serve in war in person; for *militans Deo ne implicet se negotiis secularibus*. 2 Inst. 4.

And therefore, if he holds lands by chivalry, &c. he ought to find a sufficient deputy, or pay escuage; and need not serve in person. Co. L. 99. a.

So, if he has lands, by reason of which he ought to be a reeve, beadle, &c. when chosen, if he was a layman; he shall not be chosen, being *infra sacross ordines*: or, if he be, he shall have a writ for his discharge, and upon that an alias, pluries, and attachment. F. N. B. 175. B. Reg. 137. b. 2 Inst. 3.

So, by the st. Marl. 52 H. 3. 10. all ecclesiastical persons are discharged of suit at the leet, or torn. 2 Inst. 4. 121.

So, by the common law, *eundo, morando, aut redeundo* from divine service, a priest cannot be arrested. 12 Co. 100. 2 Bul. 72.

And by the st. 50 Ed. 3. 5. and 1 R. 2. 15. he that so arrests shall suffer imprisonment, ransom, and make gree to the party: provided he do not hold himself there by collusion.

So, an action lies upon these statutes, if a clerk be arrested, when attending upon divine service. Vide 12 Co. 100.

Though it be through ignorance, and he is afterwards discharged.

So, one may be sued for it in the ecclesiastical court, and shall pay costs. Vide 2 Bul. 72.

But the arrest is good; and a rescuer is not excused.

[*]So, he may be arrested at the suit of the king; as, upon a warrant of a justice of peace.

Or, if he absconds, and cannot otherwise be taken.

So, a *capias* does not lie against an ecclesiastical person, who has a benefice: and for his security, upon a statute staple, merchant, or recognizance, there shall be awarded a *capias si laicus*. 2 Inst. 4.

So, in any other action where a *capias* lies, if the sheriff returns, *clericus beneficiatus, nullum habens laicum feodum*, there shall be a writ to the bishop, commanding that he compel him to appear. 2 Inst. 4. 2 Rol. 220. l. 45.

And if the bishop does not cause him to appear, a *distringas* goes against the bishop. Reg. 26. b.

So, if upon a *fieri facias* the sheriff returns *clericus beneficiatus, &c.* there shall be a *fieri facias* to the bishop to levy *de bonis ecclesiasticis*. Reg. 22. 26. b.

And upon such a writ to the bishop, he by his mandate shall sequester his benefice till he appears, or the money be levied. 1 Sal. 320.

[On sheriff's return that defendant is *clericus beneficiatus nullum habens laicum feodum, fieri facias de bonis ecclesiasticis* issued to the bishop, on affidavit of the debt's being levied, rule to the bishop to return to the writ. E. 4 G. Str. 87.]

[On affidavit of debt's being levied, the bishop being dead, rule to his executor to return *fieri facias de bonis ecclesiasticis*. Ibid.]

[Though a *levari facias de bonis ecclesiasticis* be a continuing execution, and a levy may be made under it from time to time after it is returnable, till the sum indorsed be satisfied; yet if it be actually returned, the authority of the bishop is at an end. C. P. M. 36 Geo. 3. 2 H. Bl. 582.]

[Therefore where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits of a vicarage, accruing as well before as after the return day, and being ruled to return the writ, returned only the amount of the sum levied up to the return-day, the court would not order the writ and return to be taken off the file, but would only permit the return to be amended by inserting the sum levied, up to the time when the writ was actually returned. Ibid.]

[The proper mode of proceeding is to rule the bishop from time to time to know what he has levied. Ibid.]

[Attachment may issue against bishop for not returning *fieri facias de bonis ecclesiasticis*. Semb. But it is more proper to move against his chancellor, commissary, or official, who usually return them. T. 25 & 26 G. 2. 1 Wils. 332.]

But where the sheriff returns *clericus nullum habens laicum feodum*, without saying *beneficiatus*, a *capias* shall be granted to the sheriff against him; for it does not appear that he has a benefice, by which he may be warned by the bishop. 2 Inst. 4.

So, upon a *fieri facias* against a bishop, the sheriff ought not to return *clericus beneficiatus*: for he has temporalities. Semb. Het. 20.

So, if the return is *clericus beneficiatus*, the bishop cannot sequester his salary: as, fellow of a college by a mandate to the master, &c.; for that is no benefice. R. 1 Sal. 320.

So, in other cases, an ecclesiastical person is not privileged from an arrest for a just cause. 2 Rol. 220. l. 40.

[*]So, by the st. M. Ch. 1. all possessions and goods of ecclesiastical persons shall be freed from all exactions. 2 Inst. 2.

And by the st. 9 Ed. 2. Art. Cleri. 9. the goods of ecclesiastical persons shall not be distrained *in via regia, aut feodis ecclesiasticis quibus olim dotata*. 2 Inst. 4. 627.

So, by the st. 18 Ed. 3. (not printed) ecclesiastical possessions acquired before 20 Ed. 1. were exempted from tenths and fifteenths granted by parlia-

ment to the king; because they were charged 20 Ed. 1. with tenths to the pope. 2 Inst. 628.

So, for tithes, which are spiritual, *nullus de reparatione pontis, aut aliquibus oneribus temporalibus onerari debet.* 2 Inst. 641.

And ecclesiastical persons shall be discharged of tolls, customs, average, pontage, paviage, &c. for their ecclesiastical goods. 2 Inst. 4.

And if they be molested, they may have a writ for their discharge. F. N. B. 227. F. Reg. 260.

So, for goods bought for their sustenance. F. N. B. 227. F.

So, they shall be discharged of purveyance for their own proper goods. 2 Inst. 3. 35.

And shall have the king's writ for their discharge. F. N. B. 30. a.

By the st. M. Ch. 9 H. 3. 21. *nulla carecta dominica personæ ecclesiasticæ, &c. per ballivos nostros capiatur.*—Confirmed, as to all purveyance, by the st. 14 Ed. 3. 1. 18 Ed. 3. 4. and 1 R. 2. 3. Vide 2 Inst. 35.

So, if an ecclesiastical person fears that his goods, or the goods of his farmer will be taken by any minister of the king, he may have a protection *cum clausula nolumus* for his security. 2 Inst. 4. F. N. B. 29. A.

So, an ecclesiastical person is capable of a temporal office: for where a petition was, that he should not be chancellor, treasurer, clerk of the privy seal, baron of the exchequer, chamberlain of the exchequer, comptroller, &c. the king answered, that he will do as he thinks fit. 2 Rol. 221. l. 5. Vide supra.

But the st. M. Ch. 9 Hen. 3. 1. confirms only the ancient rights of ecclesiastical persons; and does not give them any new ones. 2 Inst. 3.

So, notwithstanding Art. Cleri. 9. the goods of ecclesiastical persons may be taken for issues, or other dues to the king. 2 Inst. 627.

So, toll, &c. may be taken of them, if they merchandize; for the writ says, *dum merchandizas non exercent de eisdem.* Cont. per Herle, F. N. B. 227. F.

So, by express custom or prescription, tithes, &c. in the hands of a spiritual person may be charged to pontage, murage, &c. Cal. 101.

So, the clergy shall be liable to all charges imposed by act of parliament, if they be not exempted by the same act. R. 1 Vent. 273.

As to rates made pursuant to st. 43 El. for relief of the poor.

So, they shall be bound by the statutes, which require the sending of carts and horses for the repair of the highway. R. 1 Vent. 273. cited Lut. 1563. 2 Lev. 139.

But a tax or subsidy charged upon a bishop, parson, &c. if he dies, shall not be a charge upon his successor, but upon his heir or executor only. R. Lane, 51.

So, by the st. 21 H. 8. 13. no spiritual person shall take to farm to himself or his use, from the king or others, by writing or parol, any lands, tenements, &c. for life, years, or at will, on pain of 10*l.* a month, &c.

[*][The 21 Hen. 8. c. 13. was amended by 43 G. 3. c. 84. But by 59 G. 3. c. 99. all former acts relating to spiritual persons holding of farms are repealed.—Spiritual persons not to farm above eighty acres, without consent of bishop. Id. s. 2.]

[Penalty forty shillings per acre. Ibid.]

[Spiritual persons trading forfeit value of goods, and contracts void. Id. s. 3.]

[What buying and selling by schoolmasters, tutors, or other spiritual persons, excepted and allowed. Id. s. 4.]

Nor, shall take any annual rent or profit, by reason of such lease or farm, &c. on pain of 10*l.* a month, and ten times as much as he or any to his use shall take in such rent, profit, &c. a moiety to the king, the other, &c.

And such lease, &c. to any spiritual person or his use shall be void, as well against the lessor as the lessee.

Nor shall, being beneficed with cure, occupy any parsonage or vicarage in farm of the lease of any other, nor take any rent or profit out of such farm, on pain of 40*s.* per week, &c.

But by the same statute, spiritual persons may take to farm the temporalities of an archbishop, bishop, &c. during vacation.

Or, if their glebe be not sufficient, &c. may take in farm other lands for the expence of their houses and hospitalities.

And may keep as much of their lands, &c. in right of their houses, as shall be necessary for their cattle and corn, for the maintenance of their households and hospitalities, without fraud.

And may take dwelling-houses with orchards and gardens in a city, borough, or town, for their own habitation.

So, if a spiritual person takes a lease for years, or at will, of lands, &c. it shall not be void. R. Dy. 358. a.

So, by the st. 21 H. 8. 13. no spiritual person shall buy, to sell again for profit, in any market, fair, &c. any cattle, corn, lead, tin, hides. leather, tallow, fish, wool, wood, victual, or merchandize, on pain of treble value &c. And such contract shall be void.

Nor, shall use any tanhouse, or brewhouse, unless for service of the house, on pain of 10*l.* per month, &c.

But by the same statute, if a spiritual person buys without fraud, horses, cattle, goods, &c. for his necessary uses, and afterwards dislikes them, he may sell them again, &c.

[Vide st. 43 G. 3. c. 84. & 109.]

[By st. 17 G. 3. c. 53. where there is no house, or it is so much out of repair that one year's neat income will not repair it, parson, by consent of patron and ordinary, may borrow two years neat income on mortgage for twenty-five years, which binds successors. Interest and 5*l.* per cent. (or 10*l.* per cent. if non-resident) shall be paid annually. If the incumbent do not apply, the ordinary may, where the living is 100*l.* per ann. and the parson non-resident.]

[If a parsonage or vicarage house be destroyed without any fault in the incumbent, the ecclesiastical court usually orders a fifth part of the profits of the living to be set apart for rebuilding. C. P. T. 16 & 17 Geo. 2. Willes, 413.]

[*]ECCLESIASTICAL CENSURES. Vide PREROGATIVE, (D 12.)

————— COURTS. Vide COURTS, (N 1, &c.)—DISMES, (M 1, &c.)

————— JURISDICTION, AND LAWS. Vide PREROGATIVE, (D 9, &c.)

EGYPTIANS.

Vide JUSTICES, (S 9.)

EJECTMENT.

(A) BY WHOM IT LIES. p. 551.

(B) BY WHOM NOT. p. 553.

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(A) BY WHOM IT LIES.

An ejectment lies by a lessee for years for recovery of his term, and damages, if he be ousted by his lessor, or a stranger. F. N. B. 220.

[It is a possessory remedy, and only competent where the lessor of plaintiff may enter; therefore it is necessary for plaintiff to shew his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it under some exception in 21 J. 1. c. 16. H. 30 G. 2. 1 B. M. 60.]

Of what things it lies, or not, and upon what demise, and how the judgment shall be. Vide Pleader, (2 Z 1, &c.)

{ In all cases, where a right of entry exists, and the thing or interest is tangible, so that possession can be delivered, ejectment will lie for it.

Thus, if a grantor reserve to himself, his heirs, &c. for ever, the right of erecting and occupying a mill dam, at a certain place, without any hindrance or molestation from the grantee, his heirs, &c. he has such an interest in the *locus in quo* as will support an ejectment. Jackson v. Buel, 9 Johns. Rep. 298.

But it is otherwise, if the place or quantity of ground be not defined, and there be no actual entry or location. Jackson v. May, 16 Johns. Rep. 184.

So ejectment will not lie for things whereof possession cannot be delivered; as for a mere privilege of a landing place held in common with other citizens of a town. Black v. Hepburne, 2 Yeates, 331. }

But now the course is to make a nominal plaintiff upon a feigned demise.

And after the declaration delivered, the plaintiff may be changed by rule of court, before plea, if there be cause for it; as, if he be a witness upon the trial of the cause. 5 Mod. 333.

[Ejectments are under the control of the court, and may be managed by them to answer every end of justice and convenience. H. 2 G. 3. 3 B. M. 1290.]

[And therefore, if by any means the plaintiff can be supposed to have a title as laid in the declaration, after verdict, the court will support the judgment: thus, if there be two demises of the same premises laid on the same day, the court of error in favour of the judgment will suppose that the demises were made by two joint tenants of the whole land, though each demise will pass only the respective moiety of him whose demise it is. 1 Wils. 1.]

[The court will not order a lessor, having privilege, to name a good plaintiff to be liable to costs. M. 8 G. Str. 479.]

[If a person claims land as lord, by escheat, the proper way to try the right is for him to bring ejectment; and the person claiming as heir shall defend either alone or with the tenant in possession. H. 2 G. 3. 3 B. M. 1290.]

[The formal title of a trustee shall not be set up against the *cestuy que trust*: but if the trustee is a trustee for mortgagees, and not for the [*]defendant the mortgagor, he may recover. P. 6 G. 3. 3 B. M. 1898.]

[Where it is clear that the person in whom the legal estate is vested is a mere trustee, he shall not avail himself of his title to defeat his *cestuy que trust* from recovering in ejectment. Doug. 721. 777.]

[As where a trust term is a mere matter of form, and the deeds mere muniments of another's estate: this shall not be set up against the real owner. 1 Term Rep. 759. n.]

[So, tenant in possession under a lease, whose tenancy is not meant to be

disturbed by the lessor of the plaintiff in ejectment, shall never set up his lease to bar the recovery. *Ibid.*]

[So, a mortgagor shall not set up the title of a third person against his mortgagee. *Ibid.*]

[Nor, tenant against his lessor. *Ibid.*]

[Neither shall the surrenderor of a copyhold, before admittance, set up a formal objection against the surrenderee. *Ibid.* 600.]

[In such cases the jury may presume an old satisfied term surrendered to the *cestuy que use*, in order to substantiate a lease executed by him. B. R. M. 37 Geo. 3. 7 T. R. 2. B. R. M. 37 Geo. 3. 7 T. R. 47.]

[But if no such presumption be made, and it appear in a special verdict that such a term is still outstanding in a trustee, who is not joined in the action, the *cestuy que use* cannot recover. *Ibid.*]

[Where plaintiff produced an original lease of a long term, and proved possession for seventy years, the mesne assignments shall be presumed. 2 Bl. 1228.]

[If B. claiming under A. let lands for a year to C., and die, and A. afterwards bring an ejectment against C., C. cannot dispute A.'s title. B. R. H. 38 Geo. 3. 7 T. R. 488.]

{ If tenant for years holds over, he cannot in ejectment against him, dispute the title of the lessor, nor set up the title of another. *Jackson v. M'Leod*, 12 Johns. Rep. 182. }

[But a mere equitable title is insufficient to support an ejectment. 7 T. R. 2.]

[In ejectment the person having the legal title must prevail. B. R. M. 3 Geo. 3. 8 T. R. 2.]

[And therefore a plaintiff, claiming under an *elegit* subsequent to a lease granted to the tenant in possession, cannot recover, though he give the tenant notice that he does not mean to disturb his possession, but only wishes to get into the receipt of the rents and profits. *Ibid.*]

[When the landlord is made defendant, the plaintiff must prove the defendant's tenant in possession of the premises. 1 Wils. 220.]

[And can recover such premises only as are proved to be in the possession of the tenant. C. P. M. 37 Geo. 3. 1 Bos. & Pul. 573.]

{ It seems, that evidence of title to an undivided moiety, in ejectment, will not sustain a count for the whole tract. *Young v. Drew*, 2 Hayw. 100.

But if the count is brought for a moiety, or a less quantity than the whole tract, a recovery may be had for any quantity less than the quantity demanded. *Squires v. Riggs*, 2 Hayw. 150. *Den v. Evans*, 2 Hayw. 222. *Vide Apthorp v. Backus*, Kirby, 415. *Clay v. White*, 1 Munf. 162.

So, if the defendant disclaims as to a part of the premises demanded, the plaintiff may take out a writ of possession for the residue. *Squires v. Riggs*, *ubi supra*. }

[The court will permit a mortgagee to be made defendant with the mortgagor. 8 T. R. 645.]

[The trustees under a turnpike act, having demised to one of several mortgages, such proportion of the tolls arising from the road, and of the toll houses and toll gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls; the mortgagee brought ejectment for the toll houses and gates in order to repay himself the interest due to him, and it was holden that the action lay, notwithstanding a clause in the act that all the mortgagees should be creditors upon the tolls in equal degree. 2 Bos. & Pul. 219.]

[But where trustees have power to mortgage tolls, and not the toll houses, but in fact did mortgage the toll houses, the mortgagee cannot maintain this action. 2 T. R. 169.]

{ Assignees of a bankrupt may maintain ejectment. *Barstow v. Adams*, 2 Day, 70.

And he must prove title like any other party, by producing the original deeds. *Talcott v. Goodwin*, 3 Day, 264.

One tenant in common, though he declare on his own seisin, and possession, without noticing his fellow commoner, may maintain ejectment against a mere disseisor. *Smith v. Starkweather*, 5 Day, 207.

Ejectment will lie against tenant for years, if he holds over the term; and he in reversion, may count on his own seisin, and a disseisin by the tenant, without proving an actual entry. *Barber v. Root*, 10 Mass. Rep. 260.

Whether executors and administrators can maintain actions for the possession of lands belonging to the estates of their testators or intestates, vide *Willard v. Nason*, 5 Mass. Rep. 240. }

[*][The lessor of the plaintiff in ejectment is bound at the trial to prove the defendant in possession of the premises which he seeks to recover, although the defendant has entered into the general consent rule, if the defendant contest his possession. B. R. T. 37 Geo. 3. 7 T. R. 327.]

* [One joint tenant may maintain ejectment for his share. 12 East, 39. Id. 57. 3 Taunt. 120.]

[A party can only recover in ejectment, having a legal title to the possession. Not, therefore, where it appears that a term is outstanding in another; even though the party claim the premises, subject to the charge for which the term was created. 2 T. R. 684. 1 T. R. 758. Lofft. 364.]

[Where an ejectment was brought on the return of an *elegit* against the defendant, who was in possession of the premises under a lease for years, prior to the date of the plaintiff's judgment; held, that the defendant, having a legal title antecedent to the plaintiff's, ought to prevail, though the defendant had received a notice from the plaintiff, that he did not intend to disturb his possession, but only get into receipt of the rents. 8 T. R. 2.] _

[In ejectment, the lessor of the plaintiff must recover by the strength of his own title, not by the weakness of his adversary's. 4 Burr. 2484.]

[An award, under a submission to arbitration, will give a good title on which to maintain ejectment. 3 East, 15.]

(B) BY WHOM NOT.

But an ejectment does not lie by him, who has not an immediate interest or possession: as, if a lease be to A. for years, and afterwards to B. for years, and A. be ousted; B. cannot bring an ejectment. 1 Rol. 3.

So, it does not lie by him, who has only a possession in law: as, if lessee for years makes a lease at will to one, who is ousted; the lessee for years shall not maintain an ejectment. R. 1 Rol. 3. Tanf. cont. but Co. acc. *ibid*.

{ Ejectment cannot be sustained, where the plaintiff's grantor, never had possession, and where the defendant was in possession, holding adversely. *Den v. Hamilton*, Tay. 14. Vide *Phelps v. Sage*, 2 Day, 151. *Porter v. Perkins*, 5 Mass. Rep. 233.

What seisin of a predecessor will enable a successor to maintain a writ of *entry sur disseisin*, for ministerial lands. *Brown v. Nye*, 12 Mass. Rep. 285.

Ejectment will not lie by a mortgagor against the mortgagee in possession. [*553]

sion, although the debt has been tendered, the only remedy is in equity. *Hill v. Payson*, 3 Mass. Rep. 559.

But in New-York it has been held, that a mortgagee has a mere chattel interest, and that therefore, the mortgagor may maintain ejectment against an assignee of the mortgagor. *Jackson v. Bronson*, 19 Johns. Rep. 325.

Ejectment is merely a possessory remedy; a landlord in possession, cannot, therefore, bring this action to bar the rights of his absconding lessee. *Jackson v. Hakes*, 2 Caines' Rep. 335. }

So, it does not lie by any one when his interest is determined; as, if a man covenants to stand seised of 100*l.* *per ann.* to the use of his daughters, till they raise 500*l.* for their portions successive; after twelve years the eldest daughter cannot enter or have an ejectment, though her portion was not raised; for that would be to the prejudice of the other daughters. *R. Cro. El.* 800.

[Twenty years adverse possession in defendant takes away plaintiff's right of possession, as well as his action or remedy by ejectment. *H.* 30 *G.* 2. *B. M.* 60.]

[But the possession of the defendant must be *adverse* to let in the operation of the statute. *C. P. M.* 42 *Geo.* 3. 2 *Bos. & Pul.* 542.]

{ What shall be an adversary possession, so as to bar the plaintiff in ejectment, and what not. *Jackson v. Todd*, 2 Caines' Rep. 183. *Jackson v. Bowen*, 1 Caines' Rep. 358. *Smith v. Eurtis*, 9 Johns. Rep. 174. *Brandt v. Ogden*, 1 Johns. Rep. 156. *Jackson v. Schoonmaker*, 2 Johns. Rep. 230. *Jackson v. Parker*, 3 Johns. Cas. 124. *Wickham v. Conklin*, 8 Johns. Rep. 170. 2d edit. *Jackson v. Sharp*, 9 Johns. Rep. 163. *Jackson v. Graham*, 3 Caines' Rep. 188. *Jackson v. Sternbergh*, 1 Johns. Cas. 153. *S. C.* 1 Johns. Rep. 45. *in nota.* *Brandt v. Marshall*, 1 Caines' Rep. 394. *Jackson v. Bard*, 4 Johns. Rep. 230. *Doe v. Campbell*, 10 Johns. Rep. 475. *Jackson v. Waters*, 12 Johns. Rep. 365. *Jackson v. Creal*, 13 Johns. Rep. 116. *Jackson v. Haviland*, 13 Johns. Rep. 229. *Jackson v. Smith*, 13 Johns. Rep. 406. *Jackson v. Vrooman*, 13 Johns. Rep. 488. *Jackson v. Moore*, 13 Johns. Rep. 513. *Jackson v. Delancy*, 13 Johns. Rep. 537. *Jackson v. Robins*, 15 Johns. Rep. 169. *Jackson v. Thomas*, 16 Johns. Rep. 293. }

By the st. 4 *Geo.* 2. 28. if half a year's rent be due, the lessor having title of re-entry may, without legal demand or re-entry, serve an ejectment, and on judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, on proof by affidavit; or, if defendant appear, on proof at the trial, that half a year's rent was due, and no sufficient distress, and he had title to re-enter, the plaintiff shall have judgment and execution; and after six calendar months after execution [*] and no payment of arrears and costs, the lessee, or any claiming under him, shall have no relief in equity.

[Under this statute a landlord cannot under a clause of re-entry, recover in ejectment, if there be a sufficient distress, on the premises; neither can he recover at common law, unless he demand the rent on the day when it becomes due. *B. R. H.* 37 *G.* 3. 7 *T. R.* 117.

[A. by will gave a leasehold estate to B., his executors, &c. subject to a rent-charge to his wife during her widowhood, with power to the widow to enter for non-payment, and to enjoy, &c. till the arrears were satisfied: and after the widow's marriage or death, he willed that B. should pay the rent-charge to C., his executors, administrators, and assigns: the widow married, on which C. received the rent-charge, during his life, and then C. died,

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without disposing of the rent-charge, appointing D. his executor; held that D. had no right of entry for non-payment of the rent-charge. C. P. M. 18 Geo. 2. Willes, 500.]

[If D. had had a right of entry, a demand would have been necessary. Ibid.]

Provided, a mortgagee not in possession shall not be barred, if, in six calendar months after execution, he pay all arrears and costs, and perform the covenants of the lease.

[By the st. 11 G. 2. 19. the tenant, to whom a declaration in ejectment shall be delivered, shall forthwith give notice to his landlord on pain of forfeiting the value of three years improved rent.]

[And the court may suffer the landlord to make himself defendant by joining with the tenant: but in case the tenant shall neglect to appear, judgment shall be signed against the casual ejector; but if the landlord shall desire to appear by himself, and consent to enter into the common rule, the court shall permit him so to do, and order a stay of execution upon the judgment against the casual ejector till further order.]

[If a landlord serves tenant with ejectment under 4 G. 2. c. 28. and has judgment by default, and possession delivered, and tenant tenders no rent, nor files bill for relief, but several years after brings ejectment against the landlord, he shall not recover; though at his second ejectment no affidavit is produced that half a year's rent was due, and no sufficient distress countervailing the arrears. T. 31 G. 2. 1 B. M. 614. (for it shall be presumed that an affidavit was regularly made, and that all the requisites of that act were duly complied with.)]

[A. covenants that B. (a partner) shall live in his house, and that if A. dies, his executor shall renew the lease. A. cannot recover. P. 8 G. 3. 4 B. M. 2208.]

Vide Estates, (H 9.)—Pleader, (2 Z 1, &c.)

EJECTMENT OF WARD. Vide GUARDIAN, (H 2.)

[*]ELECTION.

(A) ELECTION, WHO SHALL HAVE IT.

(A 1.) He who ought to do the first act. p. 555.

(A 2.) Who shall do the first act. p. 556.

(B) AT WHAT TIME ELECTION SHALL BE MADE. p. 556.

(C) DETERMINATION OF AN ELECTION.

(C 1.) What shall be. p. 557.

(C 2.) What not. p. 557.

(A) ELECTION, WHO SHALL HAVE IT.

(A 1.) He who ought to do the first act.

If an election be given to another of two several things, he, who ought to do the first act, shall have the election; as, if a man grants to another to have a rent, or a robe yearly at such a feast, the grantor has an election to

deliver the one or the other. Co. L. 145. a. B. R. M. 19 G. 3. Dougl. 15.
 { Vide Fleming v. Harrison, 2 Bibb, 171. }

If an obligation be with condition, that if the obligor work out the 40*l.* in packing when the obligee hath occasion to employ him, or pay the 40*l.* then, &c. the obligee hath election to take the 40*l.* in work or money. R. 2 Mod. 304.

If a father having three daughters grants to A. the disposition of the marriage of one of them; the father shall choose of which daughter A. shall have the marriage. R. per all the J. Dal. 73.

[If A. enfeoffs B. of the manor of D., except a close named N., and there are two closes named N., one nine acres, the other three acres; the feoffor shall choose which close he shall have. R. 1 Leo. 268.]

So, if a man leases, rendering rent, or a robe; the lessee has an election to pay the one, or the other; for he is to do the first act. Co. L. 145. a.

So, if a man grants out of his wood so many cart-loads of maple, or hazle; the grantee has the election to take the one, or the other. Co. L. 145. a.

If he grants one of the horses in his stable; the grantee has an election to take which he pleases. Co. L. 145. a.

If a man conveys two acres, the one for life, the other in fee, the grantee has an election to take the one, or the other. 1 Rol. 725. l. 45.

So, if he levies a fine of ten acres out of one hundred, the conusee has the election. R. 1 Rol. 725. l. 35.

Or, if the conusee renders back to the conusor for years, the conusor shall have the election. R. 1 Rol. 725. l. 40.

If a man covenants to make an estate at the costs of B. in fee, he shall choose what conveyance he will make; for he is to do the first act; viz. give notice what conveyance he will make. 2 Mod. 75. Vide post, (A 2.)

[*](A 2.) Who shall do the first act.

If a man be bound to make an assurance, he who is bound to make it, ought to do the first act. Co. El. 718. Vide Condition, (H). Vide ante, (A 1.)

Though it is to be made at the charge of the covenantee, obligee, &c. R. 5 Co. 22. b.

Though the covenant be to make a particular conveyance: as, a *feoffment*, &c. R. 5 Co. 22. b. R. Cont. Mo. 22.

If bound to make a lease to A. for three lives, which A. shall name; A. shall do the first act. R. 2 Mod. 75.

So, if the condition of an obligation be in the disjunctive, the election shall always be in the obligor; for the condition was for his benefit. 2 Mod. 201. R. 3 Lev. 137.

Though in one part of the disjunctive the obligee ought to do the first act. 2 Mod. 201.

If a man has several remedies for the same thing, he has an election to use which he pleases. Co. L. 145. a.

If a conveyance operates several ways, the grantee, &c. may take it as he pleases: as, if a man conveys to A. by bargain and sale, and by fine, he may take by which he pleases, if both are completed together. Semb. 4 Co. 72. a.

If by demise, bargain, and sale, the lessee may take by common law, or by way of use. R. 2 Co. 35. b.

But a man by his wrong or default may lose his election, and give it to

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the feoffee, &c : as, if a man grants so much to be taken by assignment ; if the grantor does not assign at the day, the grantee may take it in what part of the wood he pleases, without assignment. R. 1 Rol. 725. l. 30.

{ So, if on a contract for the sale of land, the vendor is able to fulfil it only in part, the vendee may elect to compel a performance of that part, and recover damages for the deficiency ; or he may rescind the contract, and recover damages for the whole. M'Connell v. Dunlap, Hardin, 41. For-man v. Rogers, 1 Marsh, 426. Rankin v. Maxwell, 2 Marsh, 494.

Or he may resort to chancery for a specifick performance. Mills v. Met-calf, 1 Marsh, 477. }

If a man enfeoffs another of two acres, the one for life, the other in fee, and he makes a feoffment of both ; the feoffor may enter for the forfeiture in the one, or the other. Co. L. 145. a.

If a man grants a rent or a robe, at such a feast, and does not deliver it at the day, the grantee may demand which he pleases. Co. L. 145. a.

So, if lessee, rendering rent, or corn, does not pay, the lessor shall have which he pleases. R. 1 Rol. 725. l. 25.

Yet, if the thing of which the election is given, is to have continuance, a failure *unica vice* does not devolve the election upon the other : as, if A. grants an annuity, or a robe, to B., to be paid at Easter *annuatim* for his life : if A. does not pay, B. shall not have a writ of annuity for the one only, but for the one or the other, in the disjunctive. Co. L. 145. a.

{ Where by the condition of a bond, the obligor had an election to pay 600 dollars for a patent right, at the end of twelve months, or to account for the profits, and the obligor failed to elect within the time limited, it was held, that the right of election devolved on the obligee. M'Nitt v. Clark, 7 Johns. Rep. 465.

So, as between debtor and creditor, where there are several debts subsisting, and a payment is made by the debtor, without any application at the time, the creditor may, within a reasonable time, make the application. Hill v. Southerland's Ex'rs. 1 Wash, 128. Blinn v. Chester, 5 Day, 166.

If A. covenants to convey a certain quantity of land out of one of two tracts, he has his election out of which tract he will convey. Fleming v. Harrison, 2 Bibb, 171.

But where one has his election of a certain quantity of land from the side or end of a larger tract, he cannot survey it in a whimsical figure, but must take it in a reasonable shape. Owings' Ex'r. v. Morgan, 4 Bibb, 274.

It seems, that the obligor in a bond for the conveyance of a parcel of a tract of land, cannot elect where he will lay it off. Beasley v. Gillespie, 4 Bibb, 314. }

(B) AT WHAT TIME ELECTION SHALL BE MADE.

If the thing of which the election is given, is to be done *unica vice*, the election ought to be at the time. Co. L. 145. a.

So, if nothing passed or vested in the grantee, &c. before his election, it ought to be made in the life of the parties. Co. L. 145. a.

As, if a man gives to A. such of his horses as A. and B. shall chuse, the election ought to be in the life of A. 1 Rol. 726. l. 2.

{ So if there be a grant of a right of election, without any vested interest before election, the election must be made in the lifetime of the parties. Vandenburg v. Van Bergen, 13 Johns. Rep. 212.

So where 100 acres of land in a certain patent, were devised to A. and to

her heirs and assigns forever, where she pleased to take them, she must make the election in her lifetime. *Jackson v. Van Buren*, 13 Johns. Rep. 525.

So if a widow dies within 40 days without making her election to abide by her husband's will, the right of election shall not be cast upon her representatives. *Boone v. Boone*, 3 Har. & M'Hen. 95. }

[*]But where an interest vests immediately by the grant, &c. election may be made by the heir or executor, as well as by the party himself. *Co. L. 145. a.*

As, if a fine be of 100 acres, and the conusee renders 50 to the conusor for years; his executor may chuse which 50 he will have. *R. 1 Rol. 725. l. 47.*

If a man gives one of his horses to A. and B.; after the death of A., B. may chuse which he will take: for an interest vested in them immediately by the gift. *1 Rol. 725. l. 52.*

So, if the election determines only the manner or degree in which he shall have the thing; his heir or executor, as well as the party himself, may make it: for in such case the interest vests immediately. *Co. L. 145. a.*

As, upon a grant of a rent-charge, the heir or assignee may elect to have it, as an annuity, or as a rent. *Co. L. 144. b.*

So, if the thing, of which election is given, is annual, and to have continuance, the heir or executor may make the election.

{ At what time the election shall be made, where no time is expressly limited. *Nelson v. Carrington*, 4 Munf. 332. }

(C) DETERMINATION OF AN ELECTION.

(C 1.) What shall be.

A determination of a man's election shall be made by express words, or by act.

As, if a man, who has election to have a fee in one acre, or another, makes a feoffment of one of them; this determines his election. *1 Rol. 726. D.*

If he leases two acres, remainder of one of them in fee, and afterwards gives licence to the lessee to cut trees in one; this amounts to an election to have the fee in the other. *Pl. Com. 6. b. 1 Rol. 726. l. 10.*

If a covenant be to pay tithes in kind, or 20s. at the election of a prebendary; by the dissolution of the prebend, and corporation which ought to pay, the election is gone. *R. Hard. 387.*

{ If real and personal estate be devised to a widow, in lieu of dower, her entry upon the real estate, will determine her election; and in pleading, it is not necessary to state, that she received the personal estate. *Ambler v. Norton*, 4 Hen. & Munf. 23.

An executor, who is also legatee, may elect to hold the goods bequeathed, either in his fiduciary or individual character; and therefore, where he took possession and exercised acts of ownership over them, it was held to be evidence that he took them in his own right. *Palmer v. Kemp's Ex'r.* 2 Marsh. 356. }

(C 2.) What not.

But if a man has his election to take by the common law, or by way of use, a general entry does not determine his election. *R. 2 Co. 37. b.*

If by grant an abbot has his election to pay tithes, or such a sum for them: the election, by the dissolution, goes to the king and his patentee. *Hard. 383.*

If a man once determines his election, it shall be determined for ever : as, if an obligation delivered to the use of A. be refused when he is first informed of it, he cannot afterwards accept it. R. 1 Rol. 726. l. 15.

If a man distrains for rent, he shall never after have annuity ; nor *vice versa*. Vide Co. L. 145. a. b. Vide Annuity, (C 1, &c.)

So, if several persons have an election, he who first makes election, determines it for ever. Co. L. 145. a.

But where an election is of several remedies, if he chooses one, he may afterwards have the other in personal cases : as, where he has election of several actions. Co. L. 146. a.

[A party having a mortgage and also a bond, as a security for the same debt, may bring an action on the bond, and arrest the defendant, [*]pending a suit in equity for a foreclosure. B. R. T. 20 Geo. 3. Dougl. 417.]

Vide more, as to election of remedies, in Action, (M 1, &c.)—Annuity, (C 1, &c.)—Audita Querela, (D).

GUARDIAN BY ELECTION. Vide **GUARDIAN**, (F 1, 2.)

ELECTION OF JUSTICES OF PEACE. Vide **JUSTICES OF PEACE**, (A 3.)

———— **IN A CORPORATION.** Vide **FRANCHISES**, (F 20, &c. 29.)—**MANDAMUS**, (C 2.)

———— **TO PARLIAMENT.** Vide **PARLIAMENT**, (D 8, &c.—E 15.)—**SCOTLAND**, (D 4, 5.)

ELEGIT.

Vide **EXECUTION**, (C 14.)—**PROCESS**, (E 6.)

ELOPEMENT.

Vide **DOWER**, (F 2.)—**PLEADER**, (2 Y 11.)

ELY.

[Under the statutes of the church of Ely, the materials for repairing the prebendal houses are to be supplied out of the church revenues, the workmanship is to be furnished by the prebendaries themselves. Against a prebendary, therefore, who has left his house in a dilapidated state, the successor can only recover the amount of the necessary workmanship ; since the successor takes the benefice, subject to the regulations annexed to it. 2 T. R. 630.]

Vide **Franchise**, (D 8.)

EMBLEMENTS.

Vide **BIENS**, (G 1, 2.)

EMBRACERY.

Vide **MAINTENANCE**.

[*]ENACTING OF LAWS.

Vide **PARLIAMENT**, (G 10, &c.)—**PREROGATIVE**, (D 1.)

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ENCLOSURE.

[*As to an inclosure from the waste* ; an inclosure, by a tenant of parcel of the waste, shall be presumed to have been made for the lord's benefit. 1 Taunt. 208.]

[An inclosure from the waste twelve years old, seen, without objection, from time to time, by the lord and steward, may be presumed to have had his licence. 11 East, 56.]

[*As to inclosure under acts of inclosure* ; see as to the measure of allotments, 7 East, 485. 1 Mars. 50. 5 Taunt. 365.]

[*Tenure of* ; see 2 T. R. 415. 2 M. & S. 175.]

[*Allotments to surveyors of the highway* ; 8 East, 38.]

[*As to commissioners* ; see for their jurisdiction, 2 B. & P. 496.]

[*Contracts with* ; 2 B. & P. 89.]

[*As to appeals against inclosures* ; see for the limitation of, 13 East, 352. 2 M. & S. 80. 230. 3 M. & S. 127.]

[*As to actions arising out of* ; see whether ousted by the appeal clause, 5 T. R. 182.]

[*Consolidation of feigned issues*. 5 Taunt. 167.]

[*As to evidence on issues relative to* ; see, in the case of making title to an allotment, 2 Price, 101.]

[*As to the construction of inclosure acts* ; see, for the general rule, 1 Anst. 281.]

[*General inclosure acts* ; 2 M. & S. 80.]

[*Particular statutes* ; 2 T. R. 701. 6 T. R. 20. 2 M. & S. 440.]

Vide Droit, (M 1, 2.)

ENDOWMENT.

Vide DOWER.—ECCLESIASTICAL PERSONS, (C 10, &c. 13.)

ENFANT.

(A) INFANT, WHO SHALL BE. p. 560.

(B) WHAT HE MAY DO.

(B 1.) May purchase. p. 560.

(B 2.) May levy a fine, or suffer a recovery. p. 561.

(B 3.) May make an exchange, lease, &c. p. 561.

[*](B 4.) A statute, or recognizance. p. 562.

(B 5.) A contract for necessaries, or for his own benefit. p. 562.

(B 6.) May do things necessary. p. 563.

(C 1.) WHAT HE CANNOT DO. p. 564.

(C 2.) What act by him is void. p. 564.

(C 3.) What, only voidable. p. 566.

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(C 4.) How avoided.—By *dum fuit infra ætatem*. p. 566.

(C 5.) By entry, &c. p. 567.

(C 6.) How affirmed. p. 567.

(C 7.) When it cannot be affirmed. p. 567.

(C 8.) By whom avoided. p. 567.

(C 9.) At what time. Within or after full age. p. 567.

(C 10.) After full age. p. 568.

(C 11.) During his nonage. p. 568.

(D) THE PRIVILEGES OF AN INFANT.

(D 1.) When the parol demurs. p. 568.

(D 2.) When not. p. 568.

(D 3.) When he shall have his age. p. 569.

(D 4.) When laches does or does not prejudice him. p. 570.

(A) INFANT, WHO SHALL BE.

By the common law, a male or a female is called an infant till the age of 21 years. Co. L. 171. L. b.

But by the civil law the age of 17 years.

So, a man, born the first of February 1600, after eleven o'clock at night, might make a will, &c. after one o'clock in the morning of the last day of January, anno 1621 : for he was then of full age. Per Holt, 1 Sal. 44.

[An infant in *ventre sa mere* is considered as born to all purposes for his benefit. 5 T. R. 49. 2 H. B. 399. 1 B. & P. 243.]

(B) WHAT HE MAY DO.

(B 1.) May purchase.

An infant has capacity to purchase lands or tenements during his infancy ; for *prima facie* it shall be intended for his benefit. Co. L. 2. b.

And therefore, if a feoffment be made to an infant, and livery to him in person, it shall be good till it be avoided.

[An infant, like another person, takes premises subject to contracts and charges antecedently imposed upon them. An infant, therefore, to whom the reversion of premises in lease from year to year descends, [*] cannot eject the tenant without the regular notice which his ancestor must have given. 2 T. R. 159.]

[The principle upon which an infant, continuing in possession after he comes of age of land leased to him during his non-age, is liable for rent incurred during that time, is, that it is doubtful whether such contract be for his benefit ; now, by holding over, he shews that it is, otherwise he would naturally throw it up ; and all contracts that are beneficial to infants bind them. 3 M. & S. 481.]

So, if an infant makes a letter of attorney to take livery, and livery is made to him by attorney ; for it shall be intended for his profit. R. 1 Rol. 730. l. 10.

(B 2.) May levy a fine, or suffer a recovery.

So, if an infant by fine conveys his estate to another, the estate passes by fine till it be avoided.

The conveyance by an infant mortgagee is binding, and cannot be avoided by entry during infancy. 3 Burr. 1794. 1 Blk. 575.]

And, if he declares the uses by deed, the declaration of the uses stands good as long as the fine is in force; for he has power to declare the uses, as incident. 2 Co. 58. a. Per two Ch. J. 10 Co. 42. b. R. 1 Rol. 730. l. 50. Dal. 47.

[If infant covenants to levy a fine at such a time, to such uses; before the time he comes of age, levies the fine, and by another deed made at full age declares it to other uses; the last deed shall lead the uses. Str. 94.]

And though the infant dies after the king's silver paid, the ingrossing shall not be stayed; for it is then a fine. Per three J. Dy. cont. Dy. 220. b. Dal. 56.

So, if an infant suffers a common recovery, and comes in as vouchee in person, or by attorney, the estate passes till the recovery be reversed. 2 Inst. 483.

And if he comes in as vouchee by guardian, he shall be bound by it. Cont. 10 Co. 43. a. R. acc. Cro. Car. 307. Hob. 197. 1 Rol. 731. l. 5. 751. l. 50. 752. l. 1. Jon. 318. R. Godb. 161. Acc. 1 Leo. 211. 1 Sid. 321. R. Cro. El. (471, 2.)

And the king, upon petition, may admit an infant to suffer a recovery by his guardian. 1 Ver. 461. Ley, 83.

But such admittance ought not to be granted, except upon urgent necessity. R. Sal. 567.

So, if an infant makes a feoffment and livery in person, the feoffment is good till it be defeated. 2 Rol. 2. l. 37. 40. 2 Inst. 483.

(B 3.) May make an exchange, lease, &c.

So, if an infant exchanges his land, and occupies the land given in exchange; it shall be good till it be defeated; for it is tantamount to a livery. Co. L. 51. b.

So, if an infant makes a lease for years rendering rent, it shall be good, till it be defeated. Co. L. 308. a. 1 Rol. 729. l. 55.

[If A. devises land and houses thereon, to six children, all infants, and the mother, acting as guardian, grants a building lease for forty-one years, and the eldest son aged nineteen joins in it, and covenants for quiet enjoyment, and that the others when of age shall confirm, and they [*]all attain twenty-one, and accept the rent for ten years after; a court of equity will establish the lease. T. 1739. 1 At. 489.]

[By st. 29 G. 2. c. 31. infants, lunatics, and feme coverts, may apply by petition to chancery, &c. and by leave surrender leases by deed, in order to renew the same.]

(B 4.) A statute, or recognizance.

So, if an infant acknowledges a statute, or recognizance; it shall be good till it be defeated. 10 Co. 43. a. Bend. pl. 123.

(B 5.) A contract for necessities, or for his own benefit.

So, if an infant makes a contract for necessities, it binds him. Co. L. 172. a.

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{ But it has been held, that a negotiable note made by an infant, even for necessities, is void. *Swasey v. Vanderheyden*, 10 Johns. Rep. 33.

But, generally, infants are liable on their contracts for necessities; and what shall be deemed such, it seems, must be submitted to the decision of the judges. *Beeler v. Young*, 1 Bibb. 519. Vide *Rainwater v. Durham*, 2 Nott & M'Cord 524. }

As, if he contracts to pay for his eating and drinking. Co. L. 172. a. R. Jon. 182.

Or, contracts generally for his table, or with his brewer for drink. R. 1 Rol. 729. l. 6. R. Latch, 157. Dy. 104. b. in marg.

So, if he contracts for necessary apparel. Co. L. 172. a. 1 Rol. 729. l. 5.

Or, with a tailor to make clothes. R. Latch, 157. R. Jon. 146. Dy. 104. b. in marg.

And if he brings the materials to the tailor, there is no need to aver that they were suitable to his quality. R. Latch, 157.

So, if he contracts for physic. Co. L. 172. a.

Or, for his cure with a surgeon, when he is wounded. Pal. 528.

Or, for billets and firing. 1 Rol. 729. l. 30.

Or, for his schooling, or instruction in reading and writing, &c. Co. L. 172. a. R. 1 Sid. 112. Mar. 40.

Or, for all together, diet, apparel, washing, lodging, and schooling. R. Pal. 528.

Or, in consideration that A. had expended 7*l.* for diet and teaching, to pay 7*l.* R. Jon. 182.

So, a contract, to pay so much *per ann.* for his diet and schooling is good. R. 1 Rol. 729. l. 35.

Or, if he be a housekeeper, to find victuals, &c. for his family. 1 Sid. 112.

[Necessaries for an infant's wife, are necessities for him, but not if provided in order for the marriage. P. 5 G. Str. 168.]

And, upon such contract by an infant, an *assumpsit* lies. R. Latch, 169. Jon. 146. Pal. 528.

Or, if he gives a single bill for money upon such contract, it binds him. 1 Rol. 729. l. 20. Cro. El. 920. R. 1 Lev. 86.

So, if he accounts upon such contract, an *assumpsit* lies upon an *insimul computasset*. Pal. 528. Dub. [B. R. M. 26 Geo. 3. 1 T. R. 40. cont.]

The court shall be judge what things are necessary. Cro. El. 583.

[If goods, not necessities, are delivered to an infant, who after full age, promises to pay, he is bound. H. 12 G. Str. 690. B. R. E. 27 Geo. 3. 1 T. R. 648.]

[Agreement of an infant, beneficial to himself at the time it is made, binds him. 2 T. R. 161.]

[*][An infant who lives with, and is properly maintained by the parent, is not liable to a stranger for necessities supplied. 2 Blk. 1325.]

[The question whether necessities, or not, was left in this case to the jury. 8 T. R. 578. 1 Esp. 211. 5 Esp. 152.]

[Where the question is, whether articles furnished to an infant are necessities, unless it clearly appears that they are not, the question must be left to the jury, 1 M. & S. 738.]

[Liveries for an infant's servant are necessities, where his situation makes it proper that he should keep one. 8 T. R. 578.]

[An infant cannot bind himself to pay for the maintenance, curing, &c. of any animals he ought not to keep. Str. 1101.]

[Therefore, in an action for farrier's work and horses medicines, where the defendant pleaded infancy, a replication that the work and medicines were necessary for the horses, was held ill, because it did not appear that the horses were proper for the defendant. Ibid.]

(B 6.) May do things necessary.

So, an infant may do things necessary to be done for the public good : as, he shall be sworn to the king in the leet, after the age of twelve years. Co. L. 172. b. Vide Chancery, (3 R. 3, &c.)

May do homage. Co. L. 65. b.

And present to a church to avoid a lapse. Co. L. 172. a.

So, an infant may do a thing, to which he is bound or compellable by law. Co. L. 172. a.

As, he may assign dower. Co. L. 35. a.

So, an infant may maintain an action against a man of full age upon mutual promises of marriage. Dub. F. g. 275.

[Infant may sue on a contract of marriage with a person of full age, though infant cannot be sued. T. 5 & 6 G. 2. Str. 937.]

So, he shall maintain *assumpsit*, covenant, &c. upon mutual promises or covenant, though he himself is not bound by his promise or covenant, on the other part. R. 1 Sid. 41. 446. Vide Action upon the Case upon *Assumpsit*, (B 14.)—Covenant, (B 1.)

[Though a contract with an infant be voidable by him, yet it cannot be avoided by the opposite party. For example, a trading contract. 2 M. & S. 205.]

[So, he may be the lessor in an ejectment, but then he must give security for cost. 1 Wils. 102.]

[But if his guardian undertake for costs, it is sufficient. Cowp. 128.]

A fortiori, where the money or consideration on the part of the infant is paid, and the consideration executed. Cont. per Winch, 1 Rol. 19. l. 15. Acc. per Hob. 77. R. 1 Sid. 41. R. 1 Vent. 51. 1 Mod. 25.

So, by custom, an infant may make a feoffment at the age of fifteen years, which shall not be defeated.

Or, a lease for years. Co. L. 45. b.

But a custom, that an infant may make a feoffment, grant, &c. when he can measure an ell of cloth, or count twelve-pence, is void. Godb. 14.

[A. mortgages to B. who dies, leaving C. his son and heir at law an infant, and D. his widow, joint executors, A. borrows more money of E., and with part pays off C. and D., who by lease and release convey to E., this conveyance binds C. the infant. M. 6 G. 3. 3 B. M. 1794.

[*][The acts of an infant which do not touch his interest, but take effect from an authority which is trusted to exercise, are binding. Ibid.]

[The infant's privilege shall never be turned to a weapon of fraud or injustice. Ibid.]

[The lord may sue for the fine due on the admittance of an infant copyholder when he comes of age. 3 Burr. 1717.]

(C 1.) WHAT HE CANNOT DO.

But an infant cannot, generally, do an act which requires an oath ; as, he cannot do fealty. Co. L. 65. b. Vide Devise, (H 2.)

Shall not be sworn upon an inquest. Co. L. 157. a. 172. b.

Cannot wage his law. Co. L. 172. b.

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Nor, make his law of non-summons. Co. L. 172. b.

So, he cannot do a thing which requires skill and ability : as, he cannot do the service of grand serjeantry at the coronation, but by deputy. Co. L. 107. b.

[An infant cannot be a mayor of a corporation, nor elected a burgess of one. Semb. M. 7 G. 2. B. R. H. 3.]

So, he cannot be steward of a manor, nor take a grant of that office in possession or reversion. Co. L. 3. b. R. 1 Rol. 731. l. 40. Cro. El. 637.

Neither can he be bailiff or receiver : for he has not skill to render an account. Co. L. 172. a.

[Neither can he be elected a burgess (of Portsmouth) though he be not sworn in till after age. Cowp. 226.]

But an infant may take a grant of the stewardship of a manor, *exercendum per se aut deputatum*. R. Cro. Car. 279. Vide Coyhold, (R 5.)

Vide officer, (B 3.)

(C 2.) What act by him is void.

So, an infant cannot do an act apparently to his prejudice : as, he cannot make a lease, not rendering rent ; for such lease shall be void. 1 Rol. 729. l. 52. R. Mo. 105. Semb. Cro. El. 220.

So, a feoffment by an infant, with livery by letter of attorney, is void. Perk. Grant. 13. } All contracts made by infants against their interest, are void ; and such as have the semblance of advantage, are only voidable. Rogers v. Hurd, 4 Day, 57. Vide Baker v. Lovett, 6 Mass. Rep. 78. Oliver v. Houdlet, 13 Mass. Rep. 237. Rogers v. Cruger, 7 Johns. Rep. 557. Cannon v. Alsbury, 1 Marsh. 76.

And if an infant submit his personal rights to arbitration, he is not bound by the award. Baker v. Lovett, *ubi supra*.

The privileges of an infant in relation to the avoidance of contracts, extend to his executors and administrators. Smith v. Mayo, 9 Mass. Rep. 62. Hussey v. Jewett, 9 Mass. Rep. 100. Vide Martin v. Mayo, 10 Mass. Rep. 137. Jackson v. Mayo, 11 Mass. Rep. 147. }

[But a feoffment by an infant, if he make livery personally, is only voidable. Ld. R. 315.]

So, a feoffment by himself to his guardian in socage, upon a presumption of fraud. 1 Rol. 728. l. 32.

So, generally, every deed by an infant ; as, a grant of a rent charge, annuity, &c. Perk. Grant. 13. 3 Mod. 310.

A surrender by him, of a term for years, to him in reversion or remainder. R. 1 Rol. 728. l. 35. Cro. Car. 502.

Though the surrender be by acceptance of a new lease upon the same rent. 1 Rol. 738. l. 40. R. Cro. Car. 502.

Though the deed be delivered with his own hand. Cont. 2 Rol. 21. l. 10.

[A joint warrant of attorney, given by the infant and another, may be vacated against the infant only. 2 Bl. Rep. 1133.]

[*][An infant cannot execute a power over a real estate. P. 1749. 3 Atkyns, 695. 1 Vesey, 298.]

[Therefore, if a father devises his real estate to trustees, to apply the rents to the sole use of his daughter, notwithstanding her coverture, and to permit her by any deed or writing to give, devise, and bequeath the same, notwithstanding her coverture, as she should think fit ; her will made during her infancy is not a good execution of this power. Ibid.]

So, regularly, a contract by an infant, if it be not for necessities, shall be void. Vide ante, (B 5.)

And therefore, a covenant by an infant to bind himself apprentice, does not bind, except when it is warranted by the custom of London, or by the st. 5 El. 4. D. Cro. El. 653. 2 Cro. 494. Vide Justice of Peace, (B 55.)

And if he be an apprentice pursuant to the custom or the statute, he is not bound by a collateral covenant. Cro. El. 653. R. Cro. Car. 179.

So, a promise by him or another, in consideration of forbearance of a debt due by him during his infancy, is void. Vide Action upon the Case upon Assumpsit, (B 1.—F 8.)

So, if an infant be a mercer, &c. and buys goods and wares for the use of his shop, the contract does not bind him. R. 1 Rol. 729. l. 15. Dy. 104. b. in marg. R. 2 Cro. 494. [M. 11 G. 2. Str. 1083.]

If he borrows money, though he afterwards employs it for necessities. 1 Sal. 279.

Or, it was lent to him for necessities; for the lender ought to provide them. R. 1 Sal. 386. 7.

So, if an action be for money lent and laid out, and the defendant pleads, within age, and the plaintiff replies, for necessities; for he does not answer to the loan. R. 5 Mod. 368.

So, if an infant trades as a merchant, and gives a bill of exchange, it shall be void. R. Carth. 160.

So, if an infant gives an obligation for a sum due for necessities, it shall be void. Co. L. 172. a. R. Cro. El. 920. Mo. 679. Adm. 1. Lev. 86.

Or, accounts for necessities bought, and an action upon *assumpsit* is brought for necessities due upon account. 2 Rol. 271.

[An infant who lives with his parent, and is properly maintained by him, cannot bind himself to a stranger, even for necessities. 2 Bl. Rep. 1325.]

So, if an infant sells goods, the sale is void; and if the vendee takes them, trespass lies against him. 1 Mod. 137. Vide post, (C 3.)

If he loses money at gaming, and the winner takes it, trover lies. F. g. 279.

[The court, on motion, will set aside a judgment on a warrant of attorney executed by an infant. T. 10 & 11 G. 2. B. R. H. 376.]

[All gifts, grants, or deeds, which do not take effect by delivery of his hand, are void. M. 6 G. 3. 3 B. M. 1794.]

[A lease on which no rent is reserved is not absolutely void. Infant may make lease, without rent, to try his title. Ibid.]

[Lessee can in no case avoid the lease on account of the lessor's infancy, therefore not void. Ibid.]

[A surrender by deed is not absolutely void; infant surrenders unprofitable lease, lessor accepts, the premises are burnt, he cannot say [*]the surrender is void. The other party to a deed can in no case object on account of infancy. Ibid.]

[If there should be a new case, where it would be more beneficial to have it void, (as if he might otherwise be subject to forfeiture, damages or breach of trust), the reason of the privilege would warrant exception to this general rule. Ibid.]

[By st. 17 G. 2. c. 26. annuity granted by infant void, though attempted to be confirmed when of age.]

[To solicit infant to grant annuity, punishable by fine, imprisonment, or corporal punishment.]

[An infant cannot give a bond even for necessities. 4 T. R. 363.]

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[Nor is he liable for interest secured on a bond. 8 East, 330.]

[And a contract prejudicial to an infant is void, and therefore incapable of confirmation. 3 M. & S. 447.]

[*Assumpsit* on an account stated does not lie against an infant. The reason is, that the consideration for the promise is, not the being found indebted, but the stating of the account; therefore there is no consideration for the promise. 1 T. R. 40.]

[If a warrant of attorney to confess judgment is given by an infant, the court will cancel it. 1 H. B. 75.]

(C 3.) What only voidable.

So, generally, every purchase by an infant is voidable. Co. L. 2. b. Vide ante, (B 1.)

And a conveyance by fine, common recovery, feoffment, exchange, &c. Vide ante, (B 2, 3.)

So, a lease for rendering rent. F. g. 279. Vide ante, (B 3.)

A statute, or recognizance. Vide ante, (B 4.)

So, a lease of a copyhold without licence, rendering rent. R. Latch, 199.

So, if an infant bails goods to his own use, it is only voidable; for trespass does not lie against the bailee. 1 Rol. 730. l. 20.

So, if he sells goods, and delivers them with his own hands, trespass does not lie against the vendee. 1 Mod. 137. Vide ante, (C 2.)

[If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial, he must take it upon himself. C. P. H. 39 Geo. 3. 1 Bos. & Pull. Rep. 361.]

[Every indenture of an infant is voidable in his election, unless made under the provisions of a statute. 5 T. R. 715.]

{ The bond of an infant is not void, but voidable only, at his election. Conroe v. Birdsall, 1 Johns. Cas. 127.

And he may avoid it, though at the time of making the bond, he fraudulently allege, that he is of full age. Ibid.

So a promissory note will not bind an infant who carries on trade as an adult, though the payee has no knowledge of his nonage. Van Winkle v. Ketcham, 3 Caines' Rep. 323.

So, the manumission of a slave by an infant, though with the approbation of his guardian, is voidable. Rogers' Ex'rs. v. Berry, 10 Johns. Rep. 132.

An infant having sold personal property, may, at full age disaffirm the sale, and reclaim the property. Williams v. Norris, 2 Litt. 157.

A promise of marriage, by an infant, is voidable only. Cannon v. Alsbury, 1 Marsh, 76. }

(C 4.) How avoided.—By *dum fuit infra ætatem*.

If an infant aliens in fee, in tail, or for life, by conveyance *in pais*, he at his full age, or his heir, may avoid it by a writ of *dum fuit infra ætatem*. F. N. B. 192. G. Vide *Dum fuit infra Ætatem*, (A).

And it lies in the *per*, in the *per et cui*, or in the *post*. F. N. B. 192. H.

So, it lies by the heir, though he be within age. F. N. B. 192. I.

So, if husband and wife alien the land of the wife, both being infants; the wife, after the death of her husband, may have a *dum fuit infra ætatem*. F. N. B. 192. K. Co. L. 337. a.

[*]So, if they join in an alienation where the wife only was an infant ; after the death of her husband, she may have a *dum fuit infra ætatem*, as well as a *cui in vita*. Dub. F. N. B. 192. L.

But if joint-tenants, infants, join in an alienation, they cannot join in a *dum fuit infra ætatem*. F. N. B. 192. K.

And if one of them aliens, the survivor shall not have a *dum fuit*, &c. for the jointure was severed, but the heir of the alienor. F. N. B. 192.

(C 5.) By entry, &c.

So, an infant, or his heir, may avoid his feoffment, &c. by entry, when the entry is not tolled. F. N. B. 192. G.

If a husband within age makes a feoffment of the land of his wife, and dies, she may enter. Lit. s. 633.

But if the alienation was by fine, recovery, &c. which are matters of record, it must be avoided by error.

So, a statute, recognizance, &c. by an infant, shall be avoided by *audita querela*.

So, an obligation, or other deed, shall be avoided by plea of within age ; for it cannot be said, *non est factum*.

(C 6.) How affirmed.

If an infant continues in possession, after his full age, of lands demised to him during his minority, he affirms the lease. R. 1 Rol. 731. l. 45.

If an infant affirms a lease to him, after his full age, he shall be liable to the arrears of rent incurred before. R. 1 Rol. 731. l. 50. 2 Cro. 320. 2 Bul. 69. Godb. 365.

So, during his infancy, if he occupies by virtue of the lease. R. 2 Bul. 69.

(C 7.) When it cannot be affirmed.

But if the estate, &c. to the infant was void, it cannot be affirmed by his agreement at full age ; as, if a lessee, being an infant, takes a new lease, to commence at a future day ; this shall not be a surrender, though at full age it commenced, and he then entered and claimed by this new lease. R. 1 Rol. 728. l. 40.

If he sells his term, the sale shall not be affirmed, though he accepts part of the money after his full age. R. Dal. 47.

{ But it seems, that an infant grantor, may, by parol declarations, when at full age, confirm the grant. Houser v. Reynolds, 1 Hayw. 143. Vide Rogers v. Hurd, 4 Day, 57.

So where an infant executes a mortgage, and at full age, conveys the same land, subject to the mortgage, the last act will confirm the first. Boston Bank v. Chamberlin, 15 Mass. Rep. 220.

As to the affirmance of contracts, generally, vide Martin v. Mayo, 10 Mass. Rep. 137. Jackson v. Mayo, 11 Mass. Rep. 147. Smith v. Mayo, 9 Mass. Rep. 62. Hussey v. Jewett, 9 Mass. Rep. 100. Whitney v. Dutch, 14 Mass. Rep. 457. }

(C 8.) By whom avoided.

A feoffment, or other alienation by an infant, may be avoided by himself.

Or, by any privy in blood ; as, by his heir. 8 Co. 42. b.

Though he be a special heir who takes *per formam doni*, and not heir general. 8 Co. 43.

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But it shall not be avoided by a privy in estate ; as, by the lord by escheat. 8 Co. 43.

{ A. a minor, executed a deed of land to B. and when at full age executed another deed of the same land to C., a purchaser under C. cannot avoid the first deed. Jackson v. Todd, 6 Johns. Rep. 257.

The plea of infancy is a personal privilege, of which the party alone can avail himself ; therefore where an action is brought against two persons upon a joint contract, one cannot avail himself of the infancy of the other. Van Bramer v. Cooper, 2 Johns. Rep. 279. Hartness v. Thompson, 5 Johns. Rep. 160. Vide Cannon v. Alsbury, 1 Marsh. 76. Vide also, Packer v. Johnson, 1 Nott & M'Cord, 1. }

(C 9.) At what time.—Within or after full age.

A feoffment, or other alienation *in pais*, by an infant, may be avoided by him or his heir at any time by entry ; be it within age, or after his full age. Co. L. 380. b.

Though it be by indenture of bargain and sale inrolled. 2 Inst. 673.

[*][If infant makes feoffment, or conveys by lease and release, and re-enters within age, still the feoffment or conveyance is only voidable, and he may elect to confirm it when of full age ; therefore a stranger cannot avail himself of infant's entry, for he cannot elect for him. M. 6 G. 3. 3 B. M. 1794.]

So, a judgment against an infant may be avoided, before or after his full age, by error, for that he appeared by attorney, being an infant, and not by guardian : for it shall not be tried by inspection, but by the country. R. 2 Rol. 573. l. 15. 25. 45.

(C 10.) After full age.

But a *dam fuit infra ætatem* does not lie by an infant himself during his nonage. F. N. B. 192. G. Vide ante, (C 4.)

(C 11.) During his nonage.

So, matter of record, which ought to be tried by inspection, cannot be avoided after his full age.

And therefore, a fine or recovery by an infant ought to be reversed by error during his nonage. 2 Inst. 483, 4, 673. Co. L. 380. b. Semb. 1 Lev. 142.

Or, upon examination and inspection of the infant, it shall be vacated. R. Skin. 24.

And the inspection ought to be before his full age. Semb. 2 Cro. 230.

So, a statute or recognizance ought to be avoided by *audita querela* during his nonage. Co. L. 380. b. 2 Inst. 673. R. 1 And. 25. Bend. 80.

But if he be inspected during his nonage, and it be recorded that he is within age ; the judgment for reversal may be after his full age. Co. L. 380. b.

When trial shall be by inspection, and how, vide Trial, (B 1, &c.)

(D) THE PRIVILEGES OF AN INFANT.

(D 1.) When the parol demurs.

In all actions ancestral rightful, when a bare right descends to the infant from his ancestor, the parol demurs till his full age ; without other plea, ex-
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cept the prayer of the tenant that the parol may demur; for he shall not be in danger of a perpetual bar of his right for want of knowledge. R. 6 Co. 3. b.

[An infant devisee sued under statute 3 W. & M. c. 14. in respect of property devised, cannot pray the parol to demur. 4 East, 485.]

[An infant cannot pray the parol to demur in any other stage of the proceedings than at the time of pleading. B. R. M. 31 G. 3. 4 T. R. 75.]

[And affidavit of infancy is not necessary: plaintiff may reply full age. Barnes, 267.]

As, in a writ of right. 6 Co. 3. b.

In a formedon in reverter. Ibid.

Or, remainder. 2 Inst. 291. Vide 6 Co. 4. a.

So, in a *dum fuit infra ætatem*, or *non compos*, by an heir within age; for a right descends from the ancestor. 6 Co. 4. a. 2 Inst. 291.

[*]So, an extent shall not be against an infant upon a statute, or recognizance, by his ancestor, during his nonage.

And if it be against the ancestor, and the sheriff returns that he is dead, and the heir within age, he shall be aided by an *audita querela*. Mo. 37.

So, by the common law, in actions ancestral possessory, (where the ancestor died in possession), by an infant, if the tenant pleads such a plea as shews that nothing, or only a bare right, descended to the infant, so that it is like to an action ancestral rightful, he may pray that the parol may demur: but not without such plea. R. 6 Co. 4. a.

As, in cosinage, aiel, besaiel, &c. till the st. Glo. 2. 6 Co. 4. a.

So, in a *quid juris clamat*, if the tenant alleges a grant to be, without impeachment of waste, and saving his privilege, &c. 6 Co. 4. b.

So, in waste if he pleads such a deed; for the infant cannot try the deed, &c. 6 Co. 4. b.

So, in a formedon in descender, if the tenant alleges a feoffment from the ancestor, with warranty and assets. 2 Inst. 291.

[If lands in fee descend on an infant, the parol shall demur in equity as in law; but where a lease is made to a man and his heirs during three lives, the heir does not take by descent but as special occupant, and shall not demur. T. 1735. 3 P. W. 365.]

(D 2.) When not.

But in an action possessory by an infant, the tenant, though he pleads such plea, cannot have the parol demur for his nonage. R. 6 Co. 3. b.

Though it be a real action for land which he has by descent, and the tenant pleads a deed, or warranty of his ancestor; as, in a writ of right of a deforcement to the infant himself. 6 Co. 3. b.

In escheat, cessavit, writ of right upon a disclaimer, where he has the seignior in possession. 6 Co. 3. b.

In a mort d'ancestor, or other assise; for the jury appears the first day, and it is *festinum remedium*. 6 Co. 4. b.

So, now, by the st. Glo. 6 Ed. 1. 2. in mort d'ancestor, cosinage, aiel, or besaiel, the parol shall not demur for the nonage of the demandant. 2 Inst. 290. 6 Co. 4. a.

Nor, by the st. W. 1. 47. in a writ of entry *sur disseisin* by the heir of the disseisee. 2 Inst. 258. 6 Co. 4. b.

Nor, in an appeal by an infant; though the infant is not bound to fight, if the defendant wages battle. 2 Inst. 320.

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Nor, in a *scire facias* to execute a fine, whereby land was rendered to his ancestor in remainder, after the death of B. now dead. R. Mo. 16.

[If error is brought on a judgment, that the parol shall demur, the nonage cannot be pleaded to the writ of error, but the infant shall answer to the errors assigned. M. 13 G. Ld. Raym. 1433. Str. 861.]

(D 3.) When he shall have his age.

So, generally, in all real actions, if the tenant be within age, and claims by descent, he shall have his age; as, in aiel, formedon, &c. 6 Co. 4. b.

If it be prayed in aid, by tenant for life, of the infant in reversion. 11 H. 6. 10. b.

[*]So, in error to reverse a fine, though the plaintiff counterpleads that she claims dower only. Per three J. 2 Cro. 392. Mo. acc. if the infant be also terre-tenant as well as heir; otherwise, not. Mo. 847. 1 Rol. 251. 323.

So, in debt against the heir, or a *scire facias* upon a judgment, statute, or recognizance. 3 Co. 13. a. Co. L. 290. a. 11 H. 6. 10. b. Vide Pleader, (2 E 3.)

And by the st. Mert. 5. *non current usuræ* against an infant; and therefore, he shall not pay a *nomine pænæ* for rent, or upon an obligation, or recognizance. 2 Inst. 88, 9.

But he shall not have his age, in an action for his own wrong; as, in a *cessavit* for his own *cesser*. 6 Co. 4. b. Co. L. 380. b.

Nor, where he claims as occupant upon a grant of an estate for life to his father and his heirs. R. 1 And. 21.

Nor, in *estrepement* for waste; for it is in the nature of trespass. 2 Inst. 328.

Nor, in a *nuper obiit*, which is to try the privity of blood. 6 Co. 4. b.

Nor, in error, where he is not terre-tenant. 47 Ed. 3. 8.

Nor, if prayed in aid as patron, in annuity against the parson; for no loss falls upon the patron. R. 11 H. 6. 10. b.

In partition. 6. Co. 4. b. Hob. 179.

In attaint, or disceit. 2 Cro. 393. 47 Ass. 9. 47 Ed. 3. 8.

In dower. 2 Cro. 393.

In a *quod ei deforceat* to avoid a recovery by default against a woman entitled to dower. 2 Cro. 393.

Nor, by the st. W. 1. 47. in a writ of entry *sur disseisin*, against the heir of the disseisor. 2 Inst. 257.

Nor, by the st. 2 W. 40. in a *cui in vita*, or *sur cui in vita*. 2 Inst. 455.

So, by the st. Marl. 52 H. 3. 6. in a writ of ward against the heir, if the heir be an infant, he shall not have his age. 2 Inst. 112.

So, if a woman recovers in dower by default, it is not error that the tenant was within age. R. Mo. 848. per two J. Gawdy cont. Cro. El. 557. 567. Mo. 342.

(D 4.) When laches does or does not prejudice him.

So, laches, generally, does not prejudice an infant, in respect of a prior right or entry; as a descent does not take away his entry. Co. L. 245. b. Vide Discent, (D 7.)

A fine, and non claim, by the common law, do not bar his right. Pl. Com. 359. Vide Fine, (K 3, 4.)

Nor, a warranty bar his entry, if he was within age at the descent of the warranty. Co. L. 380. b.

So, where there is a condition annexed to the estate, that for non-payment the rent shall be double; if the infant does not pay, it shall not be double; for by the st. Mert. 5. *non current usuræ contra aliquem infra ætatem existentem*. Co. L. 246. b. 2 Inst. 88, 9.

So, where an infant is in ward to the king, he does not forfeit his estate by breach of a condition. Hard. 16.

But an infant shall be liable for the breach of a condition in law annexed to his estate. Co. L. 233. b. Hard. 11.

So, he shall be subject to a charge, or penalty; as, for waste, or *cesser* of rent for two years. Pl. Com. 364. b.

[*]So, he shall be subject for a condition in fact annexed to his estate. Co. L. 246. b. R. 2 Lev. 21. Ray. 236. 1 Mod. 86. 1 Vent. 199.

So, he shall lose his goods if they are waived, strayed, or wrecked, &c. though an infant. Pl. Com. 364. b.

So, lapse incurs, if an infant does not present to a church within six months. Co. L. 246, a. Vide Esglise, (H 11.)

So, a villein, who continues in antient demesne for a year and a day without claim of his lord, shall be enfranchised, though the lord be an infant. Co. L. 246. a.

So, an appeal is lost if it be not commenced within a year and a day; though the heir be an infant. Co. L. 246. a.

A lord shall not enter for mortmain, if he does not enter within a year, though an infant. Pl. Com. 364. b.

Nor, shall he enter upon the purchase of his villein, if he does not enter before his alienation; for he has no title till entry. Pl. Com. 364. b.

So, a descent from the king binds an infant. Co. L. 246. a.

And a descent from a common person to an heir, who is thereby remitted; for a remitter operates against an infant. Co. L. 246. a.

So, an infant shall be charged for a trespass done by him.

So, an infant of seventeen years of age shall be charged for malicious words. Noy, 129.

{ A judgment rendered by default against an infant, in an action on a promissory note, may be reversed. Knapp v. Crosby, 1 Mass. Rep. 479.

So in an action on a judgment in a sister state, where the defendant had no notice of the original suit, he may shew, that the contract on which the suit was brought, was executed by him when he was an infant. Bartlett v. Knight, 1 Mass. Rep. 401.

The *staleness* of a demand shall not prejudice, if infancy occurs. Whaley v. Eliot's heirs, 1 Marsh. 345. }

[(E) MISCELLANEOUS.]

[*As to the liabilities of an infant.*—An infant is amenable for personal torts alone, and is not in general responsible in an action *ex delicto*, for abusing a trust or confidence reposed in him, since this, in effect, would be charging him with a breach of contract, from the performance of which the law exonerates him; hence, he is not liable for maliciously riding a horse, lent to him for hire, immoderately. 8 T. R. 335.]

[Where the substantial ground of action is contract, the plaintiff cannot, by declaring in *tort*, render a person liable who would not have been liable on his promise. Therefore, where the plaintiff declared, that having

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agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c. Held, that infancy was a good plea in bar. 2 Mars. 485.]

{ A person may be liable, when at full age, for prosecuting a suit maliciously, when an infant. *Sterling v. Adams*, 3 Day, 411.

An infant is personally liable for neglect of duty expressly enjoined by statute : as the non-performance of military duty. *Winslow v. Anderson*, 4 Mass. Rep. 376. Vide *Dyer v. Hunnewell*, 12 Mass. Rep. 271.

Infancy is a bar to an action *ex contractu*, by the owner of goods, against his agent, for a breach of orders ; but not to an action of trover for a conversion of the goods. *Vasse v. Smith*, 6 Cranch, 226.

An action of deceit will lie against an infant on a warranty in the sale of chattels ; and even when the form of action is *ex contractu*, and the form *ex delicto*, infancy is no defence. *Vance v. Word*, 1 Nott & M'Cord, 197. }

[*Evidence*.—If issue be joined on a replication to a plea of infancy, stating a ratification since the age, the plaintiff need only prove a promise by the defendant ; for, 1. The inference is, that when a man contracts, he is of proper age to contract, until the contrary be shewn. 2. The fact that he was an infant when he promised lies wholly within the defendant's knowledge. 1 T. R. 648.]

[*Execution*.—An infant plaintiff who had sued without *prochein amy*, will not be discharged on motion, when taken in execution for the costs. 18 East, 6.]

[*Rights of, as connected with third persons*.—An infant may consider whoever enters on his estate as entering for his use. Therefore, where a father died seised, leaving two infant daughters by different ventres, his heiresses at law ; held, that an entry by the mother of one of them, as her guardian in socage, created a seisin in the other, so as to carry her share by descent to her heirs. 7 T. R. 386.]

[*][Where an adult and an infant being jointly interested in a lease, the adult procures a renewal to himself only ; if beneficial, it shall enure to the infant as well. 1 B. & P. 376.]

[*Rights of third persons connected with*.—The privilege of avoiding a contract on the ground of infancy, is a personal privilege, and therefore can only be insisted on by the infant himself. 2 H. B. 511.]

{ So also, the infancy of one tenant in common will not prevent a statute of limitations from running against a tenant. *Thomas v. Machir*, 4 Bibb, 412.

If the statute begins to run against the ancestor, who dies, and lands descend to his heirs, who are all infants, it shall be suspended during their non-age. *Machir v. May*, 4 Bibb, 43. But vide *Walden v. Gratz's heirs*, 1 Wheat. 292. }

[*Liabilities of third persons connected with*.—A joint warrant of attorney to confess judgment by an infant and another, may be vacated against the infant only. 2 Blk. 1133.] { Vide *Wilford v. Grant*, Kirby, 116. }

[The infancy of one grantor does not avoid the several covenant of the other. 4 Taunt. 10.]

{ *Rights of infants in suits against them* ;—How they must plead. *Wilford v. Grant*, Kirby, 116.

Right to the profits of their own labour and earnings. Vide *Freto v. Brown*, 4 Mass. Rep. 675.

Right of maintenance. They cannot claim support from the mother, after

the decease of the father, if they have sufficient estate of their own for this purpose. *Whipple v. Dow*, 2 Mass. Rep. 415. *Dawes v. Howard*, 4 Mass. Rep. 97.

Acts of an infant, how disaffirmed. If an infant grants land by a deed, which is voidable only, a deed of the same land, at full age, will avoid the first. *Jackson v. Burchin*, 14 Johns. Rep. 124. *Jackson v. Carpenter*, 11 Johns. Rep. 539.

It seems, that where goods are sold to an infant, on a credit, and he avails himself of infancy to avoid payment, the vendor may reclaim the goods, on the ground that the property of the goods was not divested by the contract. *Badger v. Phinny*, 15 Mass. Rep. 359. }

DISCONTINUANCE BY AN INFANT. Vide DISCONTINUANCE, (C 6.)

4 LIMITATION OF ACTION BY AN INFANT. Vide TEMPS, (G 16.)

ACTION AND SUIT BY AND AGAINST AN INFANT. Vide CHANCERY, (3 R 1, 2.)—PLEADER, (2 C 1, 2.—2 E 1, &c.—2 G 3.—2 W 22.—3 L 13.)

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ENQUEST.

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[*](A) WHEN A TRIAL SHALL BE BY INQUEST.

(A 1.) If it be a mere matter of fact.

[It is of the greatest consequence to the law of England, and to the subject,
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that the powers of the judge and jury be kept distinct ; that the judge determine the law, and the jury the fact ; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England. Per Hardwicke C. J. P. 7 G. 2. B. R. H. 23.]

[The construction the law putteth upon facts found by a jury, is in all cases undoubtedly the proper province of the court. Foster, 256.]

[So, where a question of law arises at the trial ; thus, concerning the import of a written document. 1 T. R. 172.]

[*Intention* is a fact. 6 T. R. 265.]

[*Fraud*, sometimes a fact, sometimes a conclusion of law, sometimes a mixed question. 5 T. R. 426.]

[As to *reasonable*, *probable*, &c. see 1 T. R. 519. 2 H. B. 565. 6 East, 3. 7 East, 43. Co. Lit. 56. b. 1 T. R. 520. 545. 784.] { Vide Treadwell v. Bulkley, 4 Day, 395. }

As to the antiquity, number, qualification, exemption, and challenge of jurors, vide Challenge.

{ *Number of jurors.* Any departure from the ancient mode of trial by jury, is inadmissible ; a judgment, therefore, rendered on a verdict of 13 jurors, is erroneous. Whitehurst v. Davis, 2 Hayw. 113.

So, where it appears from the record that the defendant was tried by 11 jurors only, the judgment is erroneous. Doeblen v. The Commonwealth, 3 Serg. & Rawle, 237.

Challenge. A prisoner cannot challenge more than 35 jurors. State v. Gainer, 2 Hayw. 140. S. C. Cam. & Nor. 306.

In England, if the sheriff summon a jury to try his own cause, the array must be challenged ; in North Carolina, the sheriff is guilty of an offence only ; the judgment is not erroneous. Powell v. Hampton, Cam. & Nor. 90. Vide Woods v. Rowan, 5 Johns. Rep. 133.

It is not a valid ground of objection to the array, that the clerk of the court who issued the warrant to the officer to summon the jury, is a party to the suit on trial. Hart v. Tallmadge, 2 Day, 381.

But a challenge to the array will lie for any partiality or misconduct of the clerk in selecting and arraying the jury. Gardner v. Turner, 9 Johns. Rep. 260.

In an action *qui tam*, on the act against usury, which gives a moiety of the sum to be recovered to the poor of the town where the offence is committed, it is a good cause of challenge that the jury are inhabitants of such town. Wood v. Stoddard, 2 Johns. Rep. 194.

Whether, if a juror is by profession, an underwriter, it is not a good cause of challenge on the trial of an insurance cause? *Quere.* Steinback v. Columbian Insurance Company, 2 Caines' Rep. 129.

So it is a good cause of challenge, if the juror has given his opinion on the question in controversy between the parties. Blake v. Millsbaugh, 1 Johns. Rep. 316.

But not so, if the juror has said, "that if the reports of the neighbours were correct, the defendant was wrong, and the plaintiff was right." Durrell v. Mosher, 8 Johns. Rep. 347. 2d edit.

Alienage is a good cause of challenge before trial ; but it is too late to take advantage of it, after verdict. State v. Quarrel, 2 Bay, 150. Hollingsworth v. Duane, 4 Dall. 353. Siller v. Cooper, 4 Bibb, 90.

Qualifications of jurors. It is no just cause for granting a new trial, that one of the petit jurors was also one of the grand-jurors, who found the indictment. State v. O'Driscoll, 2 Bay, 153.

Jurors must be freeholders. State v. Glasgow, Cam. & Mor. 49. State v. Babcock, 1 Conn. Rep. 401.

A non juror is totally disqualified to serve on a jury. Shane v. Clarke, 3 Har. & M'Hen. 101. }

What matter shall be found by a verdict, and what verdict shall be good or not, vide in Pleader, (S 1, &c.)

Where the trial is to be of a matter of fact, regularly, it shall be tried by an inquest of the same county. 9 Co. 25. a. Dal. 74, 5.

(A 2.) Though it relate to a matter triable by certificate, record, &c.

So, if it relates to a spiritual thing when the matter of spiritual conusance is not directly in issue, it shall be tried by the country, and not by the certificate of the bishop. Vide Certificate, (A 2.)

Or, if it relates to the circumstances of a thing upon record, which do not appear upon the record: as, if the issue be, whether a tenant in a *per quæ servitia* held of the conusor at the day of the note of a fine. 2 Rol. 574. l. 13.

In escape against a sheriff, who returned, *non est inventus*: if the issue be, whether he was taken by the sheriff. 2 Rol. 574. l. 27.

If the issue be, whether an action be pending by covin; for the covin is the principal. 2 Rol. 574. l. 35.

Whether the king presented upon a judgment, or avoidance; though the king's presentment is upon record in chancery. 2 Rol. 574. l. 40.

If the issue be, at what time a patent was inrolled. 2 Rol. 575. l. 17.

Whether the king was sealed at the time of a patent. 2 Rol. 575. l. 22.

Whether a plaint was levied in an inferior court according to the custom. R. 2 Rol. 578. l. 15. Hut. 20.

If the issue be, whether the statute staple was duly seised. R. Cro. El. 233.

(A 3.) Though mixed with them.

If it be mixed with matter of record, or of another nature, it shall be tried by the country. 1 Sid. 314.

[*]So, if it be, whether a church is void by cession, deprivation, or resignation, &c.; for the avoidance is temporal, and the first thing to be inquired of. Dal. 74.

{ Negligence is a mixed question of law and fact; and when the facts have been ascertained by the jury, the question whether they amount to negligence, or not, is a question of law, and must be determined by the court. Foot v. Wiswell, 14 Johns. Rep. 304.

All questions compounded of law and fact, must be submitted to the jury, unless where there is a demurrer to evidence. Ibid. }

(B) WHEN NOT.

When trial shall be by the certificate of the bishop or ordinary, vide in Certificate, (A 1, &c.)

When, by the mouth of the recorder of London, vide in Certificate, (B)

When, by the certificate of the marshal, vide in Certificate, (C.)

When, by battle, vide in Battel, (A 1, 2.)

When, and how by the grand assise, vide in Battel, (A 3.)

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When, by inspection, vide in Trial, (B 1, &c.)

When, by the record, vide in Trial, (A).

When, by witnesses, or the examination of the justices, vide in Trial, (B 4, 5.)

When, by the peers of parliament, vide in Dignity, (F 1, 2.)—Parliament, (L 16, &c.)

(C) INQUEST, HOW SUMMONED.

(C 1.) By *venire facias*.—When it issues.

In the courts of Westminster, after issue joined, a writ of *venire facias* shall be awarded, *quod venire facias 12 bonos et legales homines de vicineto, &c. ad faciendum jurat, &c.*

[Since the jury act, 3 G. 2. c. 15. the *venire* must be *de corpore comitatus*, in the actions excepted by the act for amendment of the law. H. 11 G. 2. Str. 1085. Andr. 99.]

[By st. 24 G. 2. c. 18. it shall be *de corpore comitatus*, in actions and informations on penal statutes.]

Allowed on error. H. 7 G. 3. 4 B. M. 2018.]

[By this statute, the time for trial by nisi prius in Middlesex, is enlarged to 14 days after term.]

{ The court will not direct the sheriff to return a panel from any particular part of the county; the *venire* must be *de corpore comitatus*. Hartshorne's Les. v. Patton, 2 Dall. 252.

In the *venire* to the sheriff to summon the grand and petit jury, it is sufficient to command him to cause to come before the judges 24 *good and lawful men*, without directing the manner in which they shall be drawn or selected. White v. the Commonwealth, 6 Binn. 179. }

[Award of *venire*, with the same abbreviations by &c.'s in English as were usual in Latin, is good. Barnes, 240.]

[In a prosecution against a justice of the peace, the court refused the common rule for a good jury, because that is often made up of gentlemen who are in the commission. H. 6 G. Str. 265.]

By the common law it was returnable at Westminster.

And now, since the st. W. 2. 30. which gives the nisi prius, it shall be returnable at Westminster, *nisi tales* (viz. the justices of assise) *prius tali die et loco venerint, &c.*

Upon which statute the return of the *venire facias* was at Westminster at a day after the assises; but because by the st. 42 Ed. 3. 11. no inquest (except in assise or gaol-delivery) shall be taken before the names of the jurors be returned in court, the *venire facias* shall be returned before the day of assise, with the panel of the jurors annexed, and upon that a *distringas* or *habeas corpora* goes, returnable at a day after the assises, *nisi* such a one *prius, &c.*

[If the *venire* is returnable subsequent to the assises, verdict shall be set aside. Barnes, 460.]

[*] And it shall be entered upon the roll, that the jury made default at the return of the *venire facias*.

[A blank for the return of the *venire* in the record is not cause to arrest judgment. Barnes, 486.]

If several issues between the same parties arise within the same county, the court will grant but one *venire facias*. 2 Cro. 550, 551.

And several writs of *venire facias* cannot afterwards be granted, though nothing be done upon the first.

So, several issues by several defendants may be tried by one *venire facias*. R. Hob. 37. 2 Rol. 667. D.

Though the issues arise in several places, if the *venire facias* be from all the places. R. Hob. 37. 2 Rol. 667. D. Vide post, (C 3, 4.)

But where there are several issues, there may be several writs of *venire facias*. Hob. 37.

[If either party will suggest special matter about awarding the *venire*, a copy must be given to the opposite party, and they must have reasonable time to consider it, before a *nient dedire* is entered. M. 6 G. Str. 235.]

(C 2.) To whom it shall be directed, &c.

A *venire facias*, generally, shall be directed to the sheriff.

If a jury be struck by the master of the office upon an order of the court, a list of 48 shall be delivered, and 12 put out by the attorney of each of the parties, or (if the attorney of either, upon notice, be absent) by the master. [1 Sal. 405. M. 9 G. 2. B. R. H. 158.]

[By st. 24 G. 2. c. 18. the party applying for special jury shall pay not only the expences of striking, but all expences occasioned by the trial by special jury; and shall have no further allowance than for common jury, unless judge certifies that it was a cause proper to be tried by special jury.]

[As to entering rules for a special jury, see 5 T. R. 454.]

[And as to serving and marking rules for, see 10 East, 1. 4 Taunt. 601.]

[As to striking anew, see 5 T. R. 453. 454. 3 Taunt. 404.]

[Special juries how struck. 3 G. 2. c. 25. s. 15.]

[After common jury return, and the cause a remanet, defendant cannot have special jury in Middlesex, though it has been done at the assises. Barnes, 449. 461.]

[Not after *venire* returned. Barnes, 488.]

But if the issue arises within the palace, the *venire facias* shall be to the warden of the palace. 2 Rol. 667. E.

If the array be quashed for favour, or default of the sheriff, it shall be awarded to the coroners.

If for favour in the under sheriff, it may be to the sheriff, *ita quod subvicecomes se non intromittat*. R. 2 Rol. 669. l. 35.

If for partiality or default in one of the sheriffs of London, it shall be to the other alone. R. 1 Sal. 152. 4 Mod. 65. Sho. 329.

So, if one of the coroners be not indifferent, it shall be to the others, *ita quod ille se non intromittat*. R. 2 Rol. 670. l. 20.

If all the coroners be not indifferent, it shall be to two elisors chosen by the court.

[The method of appointing elisors, is, rule why it should not be referred to prothonotary to consider and report fit persons, rule made absolute, [*]he nominates A. and B., rule why they should not be appointed by the court, rule made absolute. Barnes, 465.]

Or, by consent of the parties, to the two justices of assise. 10 H. 4, 5.

So, if there be cause of challenge to the sheriff, the plaintiff may make suggestion upon the roll, and if the defendant confesses it, a *venire facias* shall be immediately awarded to the coroners. Dy. 367. 2 Rol. 668. G. H. Co. L. 157. b.

If the defendant does not allow the cause, he cannot afterwards challenge the array for it. 9 Ed. 4. 6. Co. L. 157. b.

If process be once awarded to the coroners, all subsequent process shall be to them. Co. L. 158. a. R. Mo. 356.

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Though there be a new sheriff afterwards. Co. L. 158. a.

So, if process be once to elisors, all afterwards (except the distringas) shall be to them. 2 Rol. 670. l. 45. 47.

But a defendant cannot make suggestion upon the roll, and have process upon it to the coroners; for he may challenge the array, and the delay shall be intended for his advantage.

So, process does not go to the coroners, where one of the sheriffs only is party or partial; for it shall be awarded to the other. R. 4 Mod. 65.

So, if process be awarded to the sheriff, and not taken, but entered to make a continuance, it may afterwards be awarded to the coroners. R. 2 Cro. 36.

(C 3.) What form is sufficient.

A *venire facias* is sufficient, though it be *ad triandum exitum inter A. et B.* when there are several issues; for it is *nomen collectivum*. R. 2 Rol. 667. C.

But by the st. 35 H. 8. 6. the *venire facias* to try the issue in the courts at Westminster, shall be in this form: *Precipe quod ven. fac. 12 liberos et legales homines de vicineto de B. quorum quilibet habeat 40s. terræ lent. reddit. per ann. ad minus per quos rei veritas melius scire poterit, et qui nec, &c.*

By the st. 27 El. 6. *quorum quilibet habeat 4l.*—By the st. 4 & 5 W. & M. 24. 10l. (vide 3 Geo. 2. c. 25. and 4 Geo. 2. c. 7.) and in Wales, 6l.

By the st. 4 & 5 Ann. 16. *12 homines de corpore comitatus.*

(C 4.) How it shall be returned.

[List of jurors to be yearly fixed on church doors. 3 G. 2. c. 25. s. 1.]

[Persons not qualified may be relieved at quarter sessions. Ibid.]

[Penalty for wilfully omitting or inserting wrong persons. Id. s. 2.]

[Duplicates of lists transmitted to the sheriff. Ibid.]

[Penalty for returning any not in duplicates. Id. s. 3.]

[Penalty for falsely recording appearances. Ibid.]

[Justices of assize, &c. may fine sheriff for returning jurors irregularly. Id. s. 4.]

[Sheriffs, &c. to enter the names of those who have served, and give certificates. Id. s. 5.]

[No money to be taken to excuse persons from serving. Id. s. 6.]

[Constables, &c. to subscribe their lists before justices upon oath. Id. s. 7.]

[*][Sheriffs, &c. on return of *venire* to annex a panel of jurors, &c. Id. s. 8.]

[Return of jurors in Wales. Id. s. 9.]

[And in counties palatine. Id. s. 10.]

The form of the return is *executis istius brevis patet in quodam panello huic brevi annex.*, and then annex in a panel the names of the jurors. Kit. 265. b.

And though the writ says twelve *probos et legales homines*, by antient usage the sheriff ought to return twenty-four. Co. L. 155. a.

By the st. W. 3. 13 Ed. 1. 33. sheriff summoning in assises (unless in grand assise) more than twenty-four, shall render damages to the party, and be amerced to the king.

So, by the common law, the sheriff ought to give the proper christian name, surname, and addition of each juror.

By the st. of York, 12 Ed. 2. 5. he ought to put his name to every return.

By the st. 27 El. 7. he shall not make return of any juror without the addition of place of abode, or other addition by which he may be known.

There ought to be fifteen days between the teste and the return. 2 Inst. 567. Vide Process, (B).

But now, by the st. 18 El. 14. it shall be aided after verdict, if the return be insufficient or imperfect: and by the st. 21 J. 13. if there be no return, when the panel of the names of the jurors is annexed to the writ; or if the name of the sheriff is not put to the return, when the writ is returned by the proper officer. Vide Amendment, (G 1, 2.)

And the court will not direct the return of the *venire facias* to be filed, unless the plaintiff pleases. 3 Mod. 245.

From what place a jury or inquest shall come, vide in Amendment, (H 1, 2.)

[It need not appear that the jury have been summoned; for since st. 3 G. 2. c. 25. there can be but one general return. T. 11 & 12 G. 2. Andr. 248.]

[To describe a juryman as of a place generally, (here, of Grafton-street), is sufficient, though there are several places of the same name. 6 T. R. 527.]

[Judgment upon a writ of inquiry set aside, because the jury were returned by the plaintiff's attorney. Cowp. 112.]

{ Where the officer omitted to insert in his return, the name of a juror, he was put upon the panel on his making oath that he had been summoned. Patterson's Case, 6 Mass. Rep. 486. }

(C 5.) By *Habeas Corpora*.

If the jury make default at the return of the *venire facias* in C. B. an *habeas corpora juratorum* shall be awarded.

[It need not appear in the return, that the jury were attached by pledges; for since st. 3 Geo. 2. c. 25. there can be but one general return. T. 11 & 12 G. 2. Andr. 248.]

[If the *venire* is returned with twenty-four, and the *hab. cor.* with forty-eight, the verdict shall be set aside. Barnes, 485.]

(C 6.) By *distringas juratores*.

If the jury make default at the return of the *venire facias* in B. R. a *distringas juratores* shall be awarded.

[*]So, in C. B. if the jury do not appear at the return of the *habeas corpora*.

A *distringas* is awarded by the court, at the return of the *venire facias*, and ought to be tested the same day; otherwise it is without warrant, and makes a discontinuance. Mod. Ca. 269.

And the want of a good teste cannot be amended. R. Mod. Ca. 269. 237.

[Warrant for a tales at a trial in a county palatine on issue joined at Westminster, is by the king's attorney-general. II. 8 G. 3. 4 B. M. 2171.]

(D) HOW SWORN.

After a full inquest appears, they shall be sworn *ad veritatem dicend.* And if it be entered, *quod electi triati et jurati super sacramenta sua dicunt, &c.* omitting, *ad veritatem de premissis dicend.*; it will be a material defect, which cannot be amended. R. 2 Cro. 119.

So, if it be said, *quod tales. &c. ad veritatem, &c. jurati*, without saying, *cum aliis jurati, &c.* R. 2 Cro. 207.

[If after the jury are charged on the trial of a capital offence, one of them [*578]

is taken ill, the judge may discharge the jury, and charge a fresh one. 4 Taunt. 309. Vide Leach Cas.]

[A person not summoned to serve on a jury, answers to the name of a person who is and serves in his room; the objection having been made before the verdict was taken, the court awarded a *venire de novo*. 2 Mars. 154. 6 Taunt. 460.]

{ It must appear from the record, that the defendant was tried by 12 jurors, and that they were lawfully sworn, otherwise it is error. Doeblor v. The Commonwealth, 3 Serg. & Rawle, 237. }

(E) WHEN AN INQUEST SHALL BE TAKEN BY DEFAULT.

In personal actions, where the plea is not a confession of the action, as in debt, &c. if a full inquest appears, but the defendant does not appear, the inquest shall be taken by default. 1 Rol. 586. l. 31. { Vide Brown v. Van Braam, 3 Dall. 344. }

So, in ejectment.

And he may then confess lease, entry, and ouster, and pray the nonsuit of the plaintiff.

So, in an assise. 1 Rol. 586. l. 15. 1 Sal. 83.

So, in a real action, if the issue be not upon the realty, but in point of damages only. 1 Rol. 586. l. 5.

Or, if upon a default before issue, process issues.

So, in trespass, though he pleads a release, which is denied; for the damages are uncertain. 1 Sal. 216.

In debt, if the defendant pleads *non est factum*; for that denies the cause of action. 1 Sal. 216.

So, if a full inquest does not appear, it may be taken by default; for the parties are demandable before the inquest. Dub. Dy. 265. a.

But in a real action, where the issue is upon the realty, and the tenant at *nisi prius* makes default, the *postea* shall be marked, and a *petit cape* shall issue; and if the tenant cannot save his default, and the demandant does not waive it, final judgment shall be against him. 1 Rol. 585. l. 35. Mod. Ca. 4.

So, in a writ of mesne, customs and services, &c. if the seigniorship be denied. 1 Rol. 584. l. 37. 40.

[*] In an appeal of rape, *capias*, *alias*, *pluries*, and exigent shall issue. 1 Sal. 217.

So, in a personal action, where the plea amounts to a confession of the action, if the plaintiff does not waive it, judgment shall be upon the default, and no inquest taken; as, if the defendant pleads a release to a debt or demand certain, and the deed is denied. 11 H. 4. 32. Bro. Default. 4. 9. 20. 1 Rol. 586. l. 37. 1 Sal. 216.

So, in detinue, if the garnishee makes default. 1 Rol. 586. l. 47.

In a *quid juris clamat*, if the defendant claims the fee. 1 Rol. 587. l. 2.

In a *quare impedit*, the inquest shall not be taken by default, but a writ awarded to the bishop. 1 Rol. 587. l. 10.

(F) HOW THE INQUEST SHALL BEHAVE THEMSELVES.

After the evidence given, the jury ought to continue together till they agree of their verdict, without eating, drinking, fire, candle, or speaking with any one, except the bailiff, to know if they be agreed. Co. L. 227. b. 15 H. 7. 1, 2. Vide Pleader.

{ It seems, that in a capital trial, if the jury separate before verdict rendered, the prisoner shall be acquitted. *State v. Garrigues*, 1 Hayw. 241.

But on an indictment for perjury, if two jurors retire from the court without leave, and without an officer, and return immediately without speaking to any one, the verdict shall stand. *State v. Carstaphen*, 2 Hayw. 238.

And it has been held by the circuit court of the U. S. for the district of Connecticut, that in a civil cause, if the jury separate before they agree on a verdict, and afterwards return their verdict, it shall be set aside, and a new trial granted. *Lester v. Stanley*, 3 Day, 287. *Howard v. Cobb*, 3 Day, 310.

The court will appoint an officer to take care of the jury, and charge him not to suffer them to separate, until they are agreed in a verdict, nor to speak to them, except to ask them if they are agreed. *Anon.* 3 Day, 311.

But according to the settled practice in Connecticut, judgment will not be arrested merely for the reason that the jury, after the cause was committed to them and before verdict rendered had separated. *State v. Babcock*, 1 Conn. Rep. 401. *Brandin v. Gramis*, 1 Conn. Rep. 402. *in nota*.

The separating of the jury before rendering their verdict, though it is a misdemeanor for which they may be punished, does not vitiate their verdict, especially, if they were agreed before separating. *Brown v. M'Connel*, 1 Bibb, 265. }

[By st. 24 G. 2. c. 18. a juryman shall be paid no more than the judge thinks reasonable, not exceeding a guinea.]

But if the jury separate on account of a great tempest, they shall not be amerced. Pl. Com. 13. b. 15 H. 7. 1. b. 14 H. 7. 30.

[A jury's representation in favour of a criminal, after conviction, is to be discountenanced. 8 Burr. 1695.]

[If a jury, not being agreed, toss up for their verdict, it is a high misdemeanour. 1 T. R. 11.]

{ And a verdict will be set aside, if the jury, to ascertain the amount of damages, agree, that each juror shall set down such sum as he may think fit, that the aggregate be divided by 12, and that the quotient shall be their verdict. *Smith v. Cheetham*, 3 Caines' Rep. 57. *Harvey v. Rickett*, 15 Johns. Rep. 87. *Heath v. Conway*, 1 Bibb, 398. cont.

But it is otherwise, where the jury adopt this mode, to arrive at a reasonable measure of damages, without binding themselves by the result, at all events. *Dana v. Tucker*, 4 Johns. Rep. 487. Vide *Cowperthwaite v. Jones*, 2 Dall. 55.

So a verdict will not be set aside, where the jury, in a justices' court, after they had retired for deliberation, enquired of the justice, whether they could add any thing to the charge of the plaintiff? who answered, "no;" nothing further being said. *Thayer v. Van Vleet*, 5 Johns. Rep. 141.

It is gross misbehaviour in a juror, to suffer any person to speak to him concerning a cause, at any time after he is summoned, and before verdict delivered. *Blaine's Les. v. Chambers*, 1 Serg. & Rawle, 169. }

[If a defendant in a criminal prosecution endeavour to influence the jury, by distributing hand-bills in the assize towns, or otherwise, it is an indictable offence. 4 T. R. 285.]

[It seems that if a juryman knows any thing touching the matter in controversy, he is not only not at liberty to state it to his co-jurors (since that would be to bias their judgment by evidence not upon oath;) he must not allow it to influence his own judgment. He may, however, use it as a means of confirming other testimony adduced at the trial. The reason of which rule appears to be, to force the juryman to come forward and give testimony

upon oath; by which means the whole of the evidence which operated with the jurors may be seen by the court out of which the record came, and they be thereby enabled to decide whether a new trial should be granted. 4 M. & S. 532.]

{ A new trial will be granted, if the jury, after they retire to their room to consider a cause, take upon themselves to examine a witness. *Thompson v. Mallet*, 2 Bay, 94. }

For more concerning inquest, vide *Copyhold*, (R 11.)—*Courts*, (P 12.)—*Leet*, (F).—*Trial*.

INTERPLEADER.

Vide *CHANCERY*, (3 T.)

[*]ENTRY.

Vide *ABATEMENT*, (H 48.)—*ENFANT*, (C 5.)—*ESTATES*, (G 14.)—*EXECUTION*, (A 1.)—*FORCIBLE ENTRY*.—*PLEADER*, (2 S 20.)—(2 W 50.)—*RENT*, (D 3.)

ENTRY FOR A CONDITION BROKEN. Vide *CONDITION*, (O 3, &c.)

ENTRY TO AVOID A FINE. Vide *CLAIM*, (B 1, &c.)

ENTRY FOR A FORFEITURE. Vide *FORFEITURE*, (A 6; 7, 8.)

ENTRY TOLLED. Vide *DISCENT*, (D 1, &c.)

WRITS OF ENTRY Vide *DUM FUIT INFRA ÆTATEM*, per totum.—(*PLEADER*, (A 3, 1, &c.)

EQUITY.

Vide *CHANCERY*, per totum.—*COURTS*, (D 7.—O 5.)—*DISMES*, (M 13, &c.)—*PARLIAMENT*, (R 13, &c.)

ERROR.

(A) WHAT THINGS MAY BE ASSIGNED FOR ERROR. p. 580.

(B) ERROR UPON AN INDICTMENT,^{*} HOW IT SHALL BE BROUGHT. p. 581.

(C) THE JUDGMENT IN ERROR. p. 582.

(D) WHEN ERROR SHALL BE AVOIDED BY ENTRY OR PLEA, WITHOUT A WRIT OF ERROR. p. 583.

(A) WHAT THINGS MAY BE ASSIGNED FOR ERROR.

In what court, by whom, against whom, and in what manner, error shall be brought, vide in *Pleader*, (3 B 1, &c.)

When it shall be a *supersedeas*, and how the record shall be removed, vide in *Pleader*, (3 B 12, 13.)

Errors, how assigned, and the proceedings thereupon, vide in *Pleader*, (3 B 14, &c.)

What pleas to error good, vide in *Pleader*, (3 B 18, 19.)

How to proceed upon errors in parliament, vide in *Parliament*, (L 1, &c.)

[A *qui tam* action of debt is a civil suit. *Cowp.* 382.]

[And a writ of error on it lies from the king's bench to the exchequer-chamber. Doug. 353.]

A writ of error is grantable in all civil actions *ex debito justitiæ*. R. Sal. 504.

[*]But in criminal cases it shall be *ex gratia*, where a statute does not provide for it; and therefore, if the attorney-general does not allow it, chancery will not direct it to be made out. R. Eq. Ca. Abr. 414.

{ Vide *Miles v. Rempublicam*, 4 Yeates, 319. *Shaffer v. Rempublicam*, 3 Yeates, 39. }

And all errors in process against parties or jurors, or award of process, or in the record, verdict, judgment, or execution, may be thereby redressed.

[If there is one defendant, and the verbs are in the plural; as *caperunt*, *abduxerunt*, &c. P. 11 G. 2 Ld. Raym. 1383.]

[That the judgment was given by a judge interested in the cause. M. 12 G. Str. 639.]

[If there is *scire facias* against two executors, and one pleads *ne unques executor*, and the other payment by testator, and there is a verdict against the last, and nothing on the other, and then award of execution, it is error. M. 10 G. 2. Str. 1055, B. R. H. 345.]

[If the swearing of the jurors is not well alleged; as if the words to speak are omitted. P. 11 G. 2. Andr. 160.]

[If defendant pleads that plaintiff became bankrupt, &c. and concludes with a general averment, it is error; for he should have concluded to the country. P. 11 G. 2. Andr. 176.]

[That it is not said that defendants appeared by attorney, nor in their proper persons, is not error. M. 13. G. Ld. Raym. 1449.]

[Nor, that a writ of inquiry was executed on the day of the return. Ibid.]

[It is no error, though there is no cause of action mentioned in the memorandum; for it sets out the bill. M. 11 G. 2. And. 23.]

[Nor, that the award to the sheriff is general, without saying of what county. Ibid.]

[An original writ of the same term in which final judgment is given, will not warrant that judgment, if it appear upon the same record, that there have been proceedings of a preceding term. 1 Wils. 181.]

[A writ of error will lie from the judgment of the court of K. B. on an information against an East India delinquent, though not from the court of commissioners, under st. 24 Geo. 3. c. 25. 6 T. R. 607.]

[A judgment will not be reversed, because the plaintiff, instead of the defendant, is adjudged to be *in misericordia*. 2 H. B. 312.]

{ Error will not lie to reverse a judgment or decree, where the decision rests in the discretion of the court: As, in petitions for new trials, &c. *Lewis v. Hawley*, 1 Conn. Rep. 49. *Granger v. Bissell*, 2 Day, 364. *Woods v. Young*, 4 Cranch, 237. *Henderson v. Moore*, 5 Cranch, 11. *Marine Ins. Co. of Alexandria v. Young*, 5 Cranch, 187. *Barr v. Gratz*, 4 Wheat. 220. *United States v. Evans*, 5 Cranch, 280. *Welch v. Mandeville*, 7 Cranch, 152. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 206. *Liter v. Green*, 2 Wheat. 306. *Girard v. Gettig*, 2 Binn. 234. *Burke v. Young's Les.* 2 Serg. & Rawle, 383. *Burd v. Dansdale*, 2 Binn. 80. *Wright v. Small's Les.* 2 Binn. 93.

But where the court refuse to nonsuit the plaintiff, on motion of the defendant, when the evidence wholly fails to support the case, error will lie. *Foot v. Sabin*, 19 Johns. Rep. 154.

So if judgment is rendered for a larger sum in damages than the amount [1581]

laid in the declaration. *Smith v. Allen*, 5 Day, 337. *Singleton v. Kennedy*, Cam. & Nor. 520.

And so, if rendered for a larger sum than is reported by referees. *Stafford v. Van Zandt*, 2 Johns. Cas. 66.

So a judgment may be reversed in part, and affirmed as to the residue : as, where minors and adults are charged as joint trespassers, the judgment as against the minors, where they make no defence, will be reversed. *Wilford v. Grant*, Kirby, 114.

So, generally, where a judgment is erroneous in part, and can be corrected without reversing the whole, it may be reversed for that part, and stand good for the rest. *Cummings v. Pruden*, 11 Mass. Rep. 206. *Johnson v. Harvey*, 4 Mass. Rep. 483. *Whiting v. Cochran*, 9 Mass. Rep. 532. *Porter v. Rummery*, 10 Mass. Rep. 64. *Smith v. Janson*, 8 Johns. Rep. 86. 2d edit. *Bradshaw v. Callaghan*, 8 Johns. Rep. 435. 2d edit. Anon. 12 Johns. Rep. 340. *Bronson v. Mann*, 13 Johns. Rep. 460.

And so where judgment is erroneous as to costs, it may be reversed as to them, and stand as to the damages. *Wilford v. Grant*, *ubi supra. ut semb.* *Nelson v. Andrews*, 2 Mass. Rep. 164. *White v. Garland*, 7 Mass. Rep. 453.

Error lies only when the proceedings are according to the course of the common law, and after final judgment. *Drowne v. Stimpson*, 2 Mass. Rep. 445.

So, it will lie for the insufficiency of the declaration. *Vide Perry v. Goodwin*, 6 Mass. Rep. 499.

So, it will lie in favour of an infant, where an appeal lay, because his infancy disabled him from taking the appeal. *Valier v. Hart*, 11 Mass. Rep. 300. *Secus*, if the aggrieved party be a person of full age. *Savage v. Gulliver*, 4 Mass. Rep. 171.

So if a party agrees not to take an appeal, he may nevertheless bring error. *Putnam v. Churchill*, 4 Mass. Rep. 516.

A judgment against a *non compos*, under guardianship, without notice to the guardian, is erroneous. *White v. Palmer*, 4 Mass. Rep. 147.

If the issue is not found by the verdict, or if the judgment does not follow the verdict, it is error. *Brown v. Chase*, 4 Mass. Rep. 436.

If on a nonsuit judgment be given against the plaintiff, for costs, error will lie. *Smith v. Sutts*, 2 Johns. Rep. 9. *Willson v. Force*, 6 Johns. Rep. 110. *Schemerhorn v. Jenkins*, 7 Johns. Rep. 373.

So if no costs are awarded. *Lovell v. Evertson*, 11 Johns. Rep. 52.

If some of the counts are bad and others good, in case of a default and interlocutory judgment, or a demurrer, and damages are assessed generally, the judgment is erroneous. *Cheetham v. Tellotson*, 5 Johns. Rep. 430. *Backus v. Richardson*, 5 Johns. Rep. 476.

If a venire be executed and returned by any other person than the sheriff, without an award to such person upon the record, it will be error. *Cooper v. Bissell*, 16 Johns. Rep. 146.

The judgment must be final, or an award in nature of a judgment. *Beale v. Dougherty*, 3 Binn. 432.

Whether error will lie, in cases where judgment is arrested ? *Vide Fish v. Weatherwax*, 2 Johns. Cas. 215. *Benjamin v. Armstrong*, 2 Serg. & Rawle, 392.

It seems, that the court is bound to give its opinion, when requested, on a point of law, relevant to the issue, and a refusal is good cause of error. *Shaffer v. Landis*, 1 Serg. & Rawle, 449. *Hamilton v. Menor*, 2 Serg. &

Rawle, 70. *Brown v. Campbell*, 1 Serg. & Rawle, 176. *Vincent v. Huff's Les.* 4 Serg. & Rawle, 298. *Smith v. Thompson*, 2 Serg. & Rawle, 49. *Powers v. M'Ferran*, 2 Serg. & Rawle, 44. *Fisher v. Lick*, 3 Serg. & Rawle, 319.

But the court is not bound to express their opinion upon an immaterial matter, nor to answer what the law is upon the whole evidence; their opinion can only be asked as to the law upon specific facts. *Brown v. Campbell*, 1 Serg. & Rawle, 176. *Covert v. Irwin*, 3 Serg. & Rawle, 283. *White v. Ryle's Les.* 1 Serg. & Rawle, 515.

Error will not lie by one of several defendants, against whom a decree has been passed; but all must join. *Phelps v. Ellsworth*, 3 Day, 144.

That the sheriff summoned a jury to try his own cause is not error; it is only a ground of challenge. *Powell v. Hampton*, Cam. & Nor. 90.

That which might have been taken advantage of by plea in abatement, is no cause of error. *Powell v. Hampton*, Cam. & Nor. 89. *Bickerstaff v. Dellinger*, Cam. & Nor. 303.

If a judgment be substantially right, it will not be reversed for any informality. *Buckfield v. Gorham*, 6 Mass. Rep. 445.

So a judgment on proceedings before a justice of the peace, will be valid, though it do not formally find the issue joined by special pleading, if there be a substantial finding on the merits. *Commonwealth v. Bliss*, 9 Mass. Rep. 322.

So if judgment be rendered on a verdict, in an action where an issue is tendered, but not joined, it will stand. *Whiting v. Cochran*, 9 Mass. Rep. 532. *Babcock v. Huntington*, 2 Day, 392.

So if the issue is not joined in demurrer, *Miller v. M'Luer*, 1 Gilm. 338.

And in all cases, the judgment will be sustained, and if necessary, will be corrected by the court, where the error complained of consists in some informality, or omission, or misprision of the clerk. *Weston's case*, 11 Mass. Rep. 417.

So a judgment at the suit of the husband alone for an injury done to the wife, will be sustained. *Southworth v. Packard*, 7 Mass. Rep. 95.

So error will not lie to reverse a judgment in an action of debt, brought upon a former judgment, for an error in the former judgment. *Hawes v. Hathaway*. 14 Mass. Rep. 233.

Irregularity in the execution is not a cause of error, where the judgment is legal;—such irregularity may be corrected by the court below. *Dumond v. Carpenter*, 3 Johns. Rep. 141. }

(B) ERROR UPON AN INDICTMENT, HOW IT SHALL BE BROUGHT.

If error be upon an indictment at the assises or quarter-sessions, the usual course is to remove the indictment by *certiorari* into the crown-office, and afterwards to sue a writ of error *coram nobis*. Mod. Ca. 178.

Or, it may be removed directly by writ of error; for both ways are good. Mod. Ca. 178.

If error be brought upon an indictment, and the indictment removed, a rule may be given in the crown-office, that the indictee assign his errors.

If he does not, there shall be a peremptory rule upon motion; and if then he does not, he shall be nonsuited, and execution awarded. Mod. Ca. 178.

{ Writs of error will not be allowed, where the merits have been fairly tried. *Commonwealth v. Pennock*, 3 Serg. & Rawle, 199.

A judgment in a criminal case, must be affirmed or reversed altogether;

it cannot be affirmed, or reversed in part. *Jackson v. Commonwealth*, 2 Binn. 79. Vide *Duncan v. Commonwealth*, 4 Serg. & Rawle, 451. }

[*](C) THE JUDGMENT IN ERROR.

What shall be done by the court, if the judgment be affirmed or reversed, vide in Pleader, (3 B 20.)

When there shall be restitution, vide in Pleader, (3 B 20.)

If judgment be in C. B. that a plea in abatement is good, and that the writ shall abate, and that judgment be reversed in B. R., the court of B. R. shall proceed upon the same writ.

So, in error upon a judgment in Wales, that a *quod ei deforceat*, does not lie, if judgment be reversed, B. R. shall proceed upon the same declaration. Jon. 381.

{ If the judgment is entire, it must be reversed *in toto*. *Richard v. Walton*, 12 Johns. Rep. 434. }

(D) WHEN ERROR SHALL BE AVOIDED BY ENTRY OR PLEA, WITHOUT A WRIT OF ERROR.

When a man shall avoid an outlawry by plea, or error, vide in Utlagary, (C 2, &c.) Vide Pleader, (2 W 39.)

If a judgment be void, it may be avoided by plea, without a writ of error.

So, if the party cannot have error, he may avoid it by plea; as, where he is a stranger to the judgment; as, if an administrator pleads a judgment against him at the suit of B., and no assets *ultra*, &c. the plaintiff by replication may shew, that the judgment was null, and how. R. 2 Mod. 308.

But if a judgment is only voidable, the party shall not avoid it without writ of error: as, if in a *cui in vita* the tenant dies, and afterwards judgment is against him, which is erroneous, and execution is sued against the heir; he shall not avoid the judgment in assise, without error. 1 Rol. 742. l. 12.

So, in a *scire facias* by an executor, upon a judgment in ejectment by his testator against B., execution shall not be avoided, nor judgment stayed, by saying that the tenant died *pendente lite*; for he ought to avoid it by error. 1 Rol. 742. l. 18.

So, error in the principal judgment, is no plea in a *scire facias* against the heir, or bail. 1 Rol. 742. l. 26, 30. Vide Bail, (R 3, &c.)

Nor, in debt upon an erroneous judgment. 1 Rol. 742. l. 35.

So, if a fine or recovery is had against an infant, it cannot be avoided by entry, without error. 1 Rol. 742. l. 50. Vide *Enfant*, (C 5.)—Fine, (H 3, &c.)

COSTS IN ERROR. Vide Costs, (B).

ERROR IN THE EXCHEQUER CHAMBER. Vide Courts, (D 6.)

ERROR TO AVOID A FINE. Vide Fine, (H 3, &c.)

• ERROR FROM IRELAND. Vide Ireland, (G).

WRIT OF ERROR NOT AMENDABLE. Vide Amendment, (2 C 4).

[*]ESCAPE.

(A) ESCAPE IN CRIMINAL CASES.

(A 1.) Voluntary. p. 583.

(A 2.) Negligent. p. 584.

(B) ESCAPE IN CIVIL CASES.

(B 1.) What remedy for it. p. 585.

(B 2.) Against whom. p. 587.

(B 3.) When against the superior. p. 588.

(C) WHAT SHALL BE AN ESCAPE. p. 589.

(D) WHAT NOT. p. 592.

(E) WHEN IT SHALL BE RETAKEN, &c. AFTER AN ESCAPE.
AND HEREIN OF VOLUNTARY RETURN. p. 594.

(A) ESCAPE IN CRIMINAL CASES.

(A 1.) Voluntary.

By the st. 5 Ed. 3. 8. inditees and appellees of felony shall be safely kept.

And therefore, if a gaoler permits a voluntary escape, it shall be felony.

2 Inst. 52. H. P. C. 114.

If the prisoner was committed for high treason, it shall be treason. 2 Inst. 52. H. 114.

So, a voluntary escape by a gaoler, shall be treason or felony, though he was only a gaoler *de facto*, and not *de jure*. 2 Inst. 592. H. 114.

So, by any stranger of one in his custody. H. P. C. 112.

But it will not be felony, if the prisoner be permitted to escape, when no felony was committed. Bro. Escape, 8. 2 Inst. 592.

Or, if he was not committed for felony; as, if A. receives a felon, knowing of the felony, and afterwards permits his escape. Sta. 32, 3.

Or, if it was not a felony at the time of the escape; as, if A. gives a mortal wound to B. upon which he is arrested and voluntarily permitted to escape, and afterwards B. dies, it is not felony. Sta. 33. a.

So, if the prisoner was not lawfully committed to his custody; as, if there was not a lawful warrant. 2 Inst. 592.

And therefore, a gaoler shall not be tried for an escape, till the prisoner be attainted upon indictment or appeal. Semb. cont. 2 Inst. 52. Acc. 2 Inst. 592. H. 110. 115. Cont. Dy. 99. a. that it shall be felony, though the prisoner be not indicted.

So, a voluntary escape of one committed for petit larceny, or for a death *per infortunium*, or *se defendendo*, is not felony. Crompt. 39. a.

[*](A 2.) Negligent.

So, by the st. Wint. 13 Ed. 1. 4. if murder or homicide be done in a walled town, &c. and the offender escapes, the town shall be amerced. 7 Co. 7. a.

So, London was. Cro. Car. 252.

By the st. 5 Ed. 3. 1. a marshal who permits the escape of inditees or appellees in his custody, by bail or without bail, shall be imprisoned for half a year, and ransomed at the will of the king.

So, if any gaoler permits the escape of any in his custody, through neglect, he shall be fined. H. P. C. 113. Sal. 272.

[*584]

Though it be a stranger, who has another in his custody ; though he is not a gaoler *de jure*. H. P. C. 112.

So, the prisoner himself may be indicted for an escape, though it be with the consent of the gaoler. R. Cro. Car. 210.

If a gaoler bails a person not bailable, it shall be a negligent escape. H. P. C. 113.

An indictment for an escape is good until a pardon or discharge be shewn ; for it shall not be intended. Sal. 272.

So, it will be good for an escape of one in his custody, though it does not appear how he came into his custody. R. 2 Rol. 146. Semb. cont. Sal. 272.

The usual fine for an escape of a person attainted is 100*l*. H. P. C. 113.

Of a person indicted, before conviction, is 5*l*. H. 113.

Of a prisoner not indicted, at the discretion of the court. H. 113.

By the st. 19 H. 7. 10. a fine for the negligent escape of any indicted for high treason, shall be 100 marks at least ; if committed for suspicion of high treason, 40*l*. ; if indicted for murder or petit treason, 20*l*. : if for suspicion of these, or indicted for other felony, 10*l*. ; if not indicted, 5*l*.

By the st. 31 Ed. 3. 4. the escape of thieves, felons, &c. shall be judged by any of the king's justices.

By the st. 1 R. 3. 3. justices of peace may inquire of escapes of felons in their sessions.

So, the leet may inquire ; though it cannot punish the escape. 2 Inst. 165. Vide Leet, (L 2.)

If the gaoler be not sufficient, the sheriff shall answer for his neglect. H. 113.

But by the st. W. 13 Ed. 1. 3. nothing shall be demanded by the sheriff, or other, for the escape of a thief or felon, till it be adjudged by the justices errant.

And this seems to be the common law. 2 Inst. 651.

But B. R. is not within this statute. 2 Inst. 166.

So, a gaoler shall not answer for a negligent escape of one not lawfully in his custody.

And therefore, the indictment ought to shew a lawful commitment to his custody. Semb. 5 Mod. 415.

So, a gaoler shall be excused for a negligent escape, if he retakes upon fresh pursuit. H. P. C. 114. Dub. 6 H. 7. 11. 10 H. 7. 25. 28.

So, the sheriff shall not answer criminally for a negligent escape of the gaoler. Salk. 272.

{ It seems, that lying in wait, near a gaol, in concert with a prisoner charged with an offence, is a misdemeanor at common law. The People v. Tompkins, 9 Johns, Rep. 70. }

[*](B) ESCAPE IN CIVIL CASES.

(B 1.) What remedy for it.

By the common law, the sheriff, and every gaoler, ought to keep persons in execution *in salva custodia*. 3 Co. 44.

And if such prisoner escapes, an action upon the case lies against him. 2 Inst. 382. R. 1 Rol. 99. l. 10. 15. 2 Cro. 289. 2 Lev. 150.

[So, an action on the case lies against the warden of the Fleet for an escape on mesne process, and the plaintiff shall recover damages, 2 Wils. 294.]

So, by the st. W. 2. 13 Ed. 1. 11. *si vicecomes, &c. per repleg. &c. permittat* (an accountant) *sine assensu domini iri ad largum, respondeat de damnis, et si non habet, &c. respondeat superior.* F. N. B. 130. B.

So, by the st. de merc. 13 Ed. 1. the gaoler shall receive the conuser, and answer for his body, or the debt, and if he has not, the superior.

So, by the st. 1 R. 2. 12. if the warden of the Fleet permits a prisoner to go at large without the king's writ, or agreement of the party, debt lies against him.—Debt or action upon the case. R. Cro. El. 767.

[Debt lies by 1 R. 2. c. 12. as well for a negligent as for a voluntary escape. T. 4 G. 2. Str. 873. 2 H. Bl. 108.]

And by the equity of these statutes debt lies in all cases, for an escape, against a gaoler. 2 Inst. 382. R. Pl. Com. 36. b. Adm. 2 Lev. 159. 15 Ed. 4. 20.

[Provided the party be in custody in execution. Vide infra.]

And may be sued by writ or by bill of debt. 2 Inst. 382. Dub. Pl. Com. 38. a. 42 Ed. 3. 13. a. { Vide Rawson v. Dole, 2 Johns. Rep. 454. Van Slyck v. Hogeboom, 6 Johns. Rep. 270. }

It may be against the mayor of the staple for an escape of one in his custody in execution; 9 H. 6. 19.

Debt lies for an escape against a gaoler within the Cinque Ports. 30 H. 6. 6.

So, for an escape in a court of pypowders. 2 Inst. 362.

[In escape on mesne process in an inferior court, defendant shall not take advantage of any error below, if he might justify the arrest under the process. M. 23 G. 2, 1 Wils. 255.]

So, for the escape of one committed by commissioners of bankrupts. R. Mo. 834. Vide post, (C).

So, if two are in execution, and one of them escapes. 2 Rol. 205.

If husband and wife are in execution upon a judgment against both, and the wife escapes. Dub. 1 Rol. 204.

By the st. 8 & 9 W. 3. 27. if the keeper of a prison take money or security to permit or assist an escape, he forfeits 500*l.* and his office, and shall be ever incapable of a like office.

If judgment be against the marshal of B. R. or warden of the Fleet for an escape or his deputy, on oath by the party that the judgment was without fraud and for a real debt, the court on motion shall sequester the profits of the office for satisfaction.

And execution or sequestration shall not be stayed by writ of error, unless special bail be given.

And the inheritance of the Marshalsea, or Fleet, shall answer for escapes or misdemeanors by themselves or deputies, and shall be extended for that purpose.

[*]So, by the st. 1 Ann. st. 2. c. 6. the sheriff shall be liable for an escape of any committed to him on an escape-warrant.

So, an action lies against a gaoler for an escape of one committed upon process of the admiralty. R. Sav. 11. 15.

[Or, arrested upon an *excommunicato capiendo*. R. Ld. R. 788.]

Or, upon a *capias utlagatum*: and the plaintiff shall recover the whole debt in damages. R. Mo. 641. R. 5 Mo. 200.

[Case lies for the escape of a man in custody upon a *capias utlagatum* upon an outlawry on mesne process. P. 4 G. 2. Str. 901. 1 T. 64.]

[Which action is founded on the damage sustained; and if no damage is
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sustained, the creditor has no cause of action. B. R. M. 33 Geo. 3. 5 T. R. 37.]

[The difference between being in custody in execution, and on mesne process. Ibid.]

[In the former case debt lies, and the creditor may recover the whole debt, in the latter instance an action on the case must be brought, and the damages will be proportioned to the delay or prejudice the creditor may have experienced in recovering his debt. By Buller J. *ibid.*] { Vide *Smith v. Hart*, 2 Bay, 395.

In an action against a county for an escape, on mesne process, through the insufficiency of the gaol, damages may, on enquiry, be assessed to the full amount of the debt for which the prisoner was in custody, with interest; but this will not be a matter of course, as a consequence of the verdict for the plaintiff against the prisoner, in the original action. *Hubbard v. Shaler*, 2 Day, 195.

Either debt or case will lie against the sheriff, for an escape, whether negligent or voluntary. *Colby v. Sampson*, 5 Mass. Rep. 310.

What shall be the rule of damages, in debt, against the sheriff, for the escape of a prisoner committed in execution. *Porter v. Sayward*, 7 Mass. Rep. 377. *Burroughs v. Lowder*, 8 Mass. Rep. 373. *Rawson v. Dole*, 2 Johns. Rep. 454.

What shall be the rule, if the action be in case. *Bowen v. Huntington*, 3 Conn. Rep. 423. *Colby v. Sampson*, 5 Mass. Rep. 310. Vide *Rawson v. Dole*, 2 Johns. Rep. 454.

What shall be the rule, in case of an escape on mesne process. *Stone v. Woods*, 5 Johns. Rep. 182. *Potter v. Lansing*, 1 Johns. Rep. 215. *Russell v. Turner*, 7 Johns. Rep. 189. }

An action lies for an escape, though the gaoler be infant, or feme-covert. 2 Inst. 382.

[The nominal plaintiff in an ejectment sues in trespass for the mesne profits, and recovers. The defendant is taken, in execution, and escapes. Held, that the nominal plaintiff might sue for the escape. 2 M. & S. 473.]

[In an action upon the case for an escape, the jury may give what damages they please. But in an action of debt, they are bound to give what was charged in execution for, namely, the debt and the charges of the execution. 2 T. R. 126.]

[If a sheriff suffers a person taken on mesne process to escape, he is answerable for the debt which shall be proved, not merely for that sworn to. 2 Anst. 522.]

[The gravamen in escape is sufficiently alleged by the simple averment, that the defendant had not the body at the return. 2 B. & P. 561.]

[If it be alleged, that in consequence of the defendant's refusal to receive a prisoner, he escaped; the omitting to state the manner in which he escaped, supposing such certainty requisite, is aided by pleading over. 1 T. R. 60.]

[In a count for an escape, an allegation that it was voluntary is surplusage. Therefore, under such count, a negligent escape may be given in evidence; and if there has been a retaking on fresh suit, the defendant must plead it. 2 T. R. 126.]

[In an action for an escape on mesne process, out of an inferior court, it need not be alleged that the cause of action arose within the jurisdiction; nor, after verdict, will the judgment be arrested, because it is not alleged

that the defendant below did not appear at the return of the writ. 3 T. R. 127.]

[A plea of subsequent return must allege a detention, and that it continued to the time of action, or, that it has been terminated by legal means. Such detention is virtually implied in the allegation, that he did, after the return, keep and detain him. 11 East, 406.]

To plead to an action for an escape, that if the prisoner escaped several times, not specifying them, he returned as often, is bad. 1 B. & P. 413.]

[*]The affidavit annexed to the plea of recaption may be conditional if any such escape there was. 2 Blk. 1059.]

[To a plea in an action for an escape, of a negligent escape, return, and detainer since the return, the plaintiff replied that the prisoner had not since been safely kept, having again escaped from that mentioned in the plea; the rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication as to a new assignment, a negligent escape, voluntary return, and detainer since. Rejoinder held bad, for duplicity. 1 B. & P. 413.]

{ A voluntary return of a prisoner, after an escape, is equivalent to a recaption on fresh pursuit, and, if before action brought, will excuse the sheriff. *Drake v. Chester*, 2 Conn. Rep. 473. Vide *Dole v. Moulton*, 2 Johns. Cas. 205.

In such case, it will be presumed, that the sheriff consented to receive the prisoner, unless the contrary be proved. *Ibid.*

Where the creditor to prevent the return of the prisoner arrested his body, by attachment, it was held, that the sheriff was not liable for the escape. *Ibid.* }

[In an action against an officer for the escape of a prisoner arrested on mesne process, the plaintiff must prove a cause of action against the prisoner. 4 T. R. 611.]

[The declaration for an escape on mesne process, alleged that the writ was indorsed for bail "by virtue of an affidavit," &c. Held, that the affidavit must be proved. 1 B. & P. 281.]

[A declaration for an escape on final process, averred that the party was by *habeas corpus* brought before a judge of K. B., and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus* and the said commitment thereon, now remaining in the said court, more fully appears." Held, that the allegation, even though unnecessary, made proof of a commitment filed of record necessary. 3 B. & P. 456. 5 East, 440.]

{ If the sheriff returns, upon mesne process, that the defendant escaped, generally, he shall be liable for the escape. *Tuton v. Sheriff of Wake*, 1 Hayw. 485. }

(B 2.) Against whom.

The action for an escape shall be brought against him who has the custody of the gaol. Vide post, (B 3.)

Though he has it *de facto* only, and not *de jure*. 2 Inst. 381, 2.

As, it shall be against the sheriff, not against his deputy; as, the gaoler who takes care of the prison in the county. 2 Inst. 382. R. Rol. 94. l. 30. Semb. Hard. 34.

Or, the serjeant, who makes the arrest. R. 1 Rol. 806. l. 45.

The keeper of Newgate. 2 Jon. 62.

The marshal of the Marshalsea in B. R. 9 Co. 98.

If he who has the custody of a gaol in fee, substitutes another for life, or at [*587]

will, the action shall be against him ; for he has the actual possession of the office. 9 Co. 98. a.

So, if an escape be out of the custody of mayor or bailiffs of a city, town, &c. which has a gaol ; the action shall be against them, and not against the sheriff. 1 Rol. 99. l. 15.

So, it shall be against a bailiff of a franchise, if the escape be by him. 1 Rol. 99. l. 45.

And against the serjeant who made the arrest, if the escape be after an arrest by him upon process from the compter before commitment to the compter. R. 1 Rol. 806. l. 30.

So, it shall be against both the sheriffs of London, if the escape be after an arrest upon a plaint in the compter of one of them. Dub. Sho. 162. Carth. 145.

Or, against the surviving sheriff of London, where one dies. R. Cro. El. 625.

So, against all the coroners, where the arrest was only by one. Dub. Com. 435, 6. Mod. Ca. 37.

So, it lies against the old sheriff, if he omits to deliver any prisoner by indenture to the new. R. 2 Leo. 54. Vide County, (B 3.)

[*]But an action for an escape shall not be against the superior, if the inferior be sufficient. 2 Inst. 382.

[Any one charged with the execution of a writ by the power whence it emanated, is liable for a neglect of duty under it. Therefore, the bailiff of a liberty having the return and execution of writs, is answerable for the escape of a prisoner arrested by him under a writ with the sheriff's mandate thereon. 2 T. R. 5.]

[As to the nominal plaintiff in ejectment suing for an escape, vide supra.]
Vide post, (B 3.)

(B 3.) When against the superior.

But in all cases where the inferior is insufficient, debt lies against the superior for the escape. Semb. 2 Jon. 60. 1 Vent. 314. 2 Lev. 158. 9 Co. 98. a. Vide ante, (B 2.)

If he be insufficient at the time of the action brought, though he was sufficient at the time of the commitment or escape ; for that is the time most regarded. 2 Jon. 61. 2 Lev. 160.

And therefore, a verdict is not sufficient, if it does not find the insufficiency when the action was brought, though it finds him insufficient when he was keeper, or at the time of the commitment, or escape. R. 2 Jon. 61. 1 Vent. 314. 2 Lev. 160.

So, it lies against the superior, though the inferior was admitted by the court. Adm. 2 Jon. 61.

Though the superior had no notice of the insufficiency. Adm. 2 Jon. 61.

The superior against whom the action ought to be brought, is he who, by his estate in office, or by his authority without estate, has the power of putting in the inferior officer. 2 Jon. 61.

As, the duke of N. being marshal of B. R. in fee, makes a deputy ; he himself is the superior, and the deputy the inferior officer. 2 Inst. 382. 9 Co. 98. b.

The sheriffs of London are the inferior, the mayor and commonalty, who have the office of sheriff in fee, are the superior. 2 Inst. 382.

If a man, who has the custody of a gaol in fee, grants it for three lives,
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he is the superior, and the grantee the inferior. 2 Inst. 382. Semb. 2 Jon. 61. 2 Lev. 159. Adm. 9 Co. 98. 1 Vent. 314.

So, the dean and chapter of Westminster are the superior, the bailiff of a franchise, put in by them, the inferior. Adm. 2 Lev. 159.

The lord of a franchise, who has a gaol, is the superior, and shall answer for his gaoler. Sav. 11. 15.

But there cannot be two superiors within the statute. 2 Inst. 382.

So, debt does not lie against the superior, upon a general declaration for an escape; but he ought to be specially charged for the insufficiency of the inferior. R. 2 Lev. 160.

So, if a man has the custody of a gaol in fee in reversion, after a grant thereof for life, rendering rent, which was not made by him, the reversioner is not superior. Adm. 2 Jon. 61.; for the superior is not such in respect of the rent, or the reversion, but in regard that the inferior officer derives his estate from him.

[*](C) WHAT SHALL BE AN ESCAPE.

An action lies for an escape, if he permits his prisoner to go at large: though he afterwards returns. D. 3 Co. 44. a. 1 Rol. 806. l. 13.

[Though he returns the same day, and afterwards plaintiff proceeds to final judgment. H. 6 G. 3. 2 Wils. 294.]

[If the defendant being taken in execution be afterwards seen at large for any the shortest time, even before the return of the writ. 2 Bl. Rep. 1048.]

Though he does not go out of the same county. 1 Rol. 806. l. 15.

Or, out of the town where the gaol is. 1 Rol. 806. l. 24. Hob. 202.

Though he has a keeper with him. D. 3 Co. 44. a. 1 Rol. 806. l. 17. 20. R. Pl. Com. 37. Hob. 202.

Or, goes with the king's licence. 1 Rol. 808. l. 19.

Or, by command of the lord treasurer or chancellor, to collect the king's debt, being in prison for the king, as well as for the party; for this does not excuse the escape as to the party. 1 Rol. 808. l. 15. R. Dy. 162. b. 297. a.

{ So if a coroner arrest an under keeper of the gaol, on execution, and deliver him at the gaol-house, the sheriff, nor any authorized person being there to receive him, the sheriff is guilty of an escape. Colby v. Sampson, 5 Mass. Rep. 310.

So if the deputy gaoler permit the prisoner to go without the prison, by day, or by night. De Grand v. Hunnewell, 11 Mass. Rep. 160. Vide Clap v. Cofran, 7 Mass. Rep. 98.

And, it seems, if an officer having arrested a debtor on an execution, commit him to a third person, who permits him to go at large, it is an escape. Commonwealth v. Drew, 4 Mass. Rep. 391.

So on surrendry of the principal, by bail, in a civil action, and he is committed to the sheriff, he cannot be permitted to go at large, before the expiration of 30 days. Randall v. Bridge, 2 Mass. Rep. 549.

Where the sheriff arrested a debtor in execution, and left him in the custody of a third person, and did not commit him until the next day, it was held to be an escape. Palmer v. Hatch, 9 Johns. Rep. 329.

So if he discharge the debtor from arrest, on the promise of a third person to pay the debt, if he failed to redeliver him. Wheeler v. Bailey. 13 Johns. Rep. 366.

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So if a constable, who has a prisoner in custody on execution from a justice's court, discharge him by order of the justice, who has no authority for that purpose, it is an escape. *Van Slyck v. Taylor*, 9 Johns. Rep. 146.

So if a prisoner be discharged out of custody, by virtue of an order of court, which is void. *Jackson v. Smith*, 5 Johns. Rep. 115. *Vide Cable v. Cooper*, 15 Johns. Rep. 152. *Hecker v. Jarret*, 3 Binn. 404.

But an order of discharge under an insolvent act, issued by a court of competent jurisdiction, will justify an escape. *Cantillon v. Graves*, 8 Johns. Rep. 369. 2d edit. *Hurst's case*, 4 Dall. 388.

So if an officer arrest a person, who is not liable to arrest, as a soldier in the army of the U. S. and afterwards, permit him to go at large, it is not an escape for which the officer is liable. *Ray v. Hogeboom*, 11 Johns. Rep. 433.

Where an officer is allowed 30 days, within which to return an examination, if he make an arrest within that time, and suffer the prisoner to go at large, it is an escape, although he has the prisoner in custody at the return day. *Pulver v. M'Intyre*, 13 Johns. Rep. 503.

So if an officer arrest a person and permit him to go at large, on his promise to follow him to the gaol, and it so happens, afterwards, that he cannot be taken, it is an escape. *Olmstead v. Raymond*, 6 Johns. Rep. 62.

So if the coroner commit a sheriff to the gaol, of which he is the keeper. *Day v. Brett*, 6 Johns. Rep. 22.

And in all cases, if the sheriff permit a prisoner to go at large without lawful authority, he shall be liable for an escape. *Kellogg v. Gilbert*, 10 Johns. Rep. 220.

A new sheriff is answerable for the escape of a prisoner delivered into custody, by his predecessor, though a voluntary escape may have existed during the time of his predecessor. *Rawson v. Turner*, 4 Johns. Rep. 469.

And the old sheriff is liable for the escape of a prisoner not assigned over to his successor. *Hempstead v. Weed*, 20 Johns. Rep. 64.

If in the execution of a *homine replegiando*, where the party is claimed as a slave, the sheriff take a bond to himself, with surety, conditioned that the party prove his freedom, &c. and is suffered to go at large, it is an escape. *Skinner v. Fleet*, 14 Johns. Rep. 263.

What shall be considered as the commencement of an action for an escape, which will prevent the defendant from justifying, on the ground of the recaption, or return of the prisoner. *Van Vechten v. Paddock*, 12 Johns. Rep. 178. *Brorson v. Earl*, 17 Johns. Rep. 63. *Visscher v. Gansevoort*, 18 Johns. Rep. 496. *Hassam v. Griffin*, 18 Johns. Rep. 48.

What indulgencies may be granted by the officer to a prisoner, after an arrest on execution. *Wool v. Turner*, 10 Johns. Rep. 420. *Hassam v. Griffin*, 18 Johns. Rep. 48. }

So, by the st. 8 & 9 W. 3. 27. if a keeper permits a prisoner on mesne process or execution to go out of the rules of the prison, unless by virtue of a *habeas corpus*, or rule of court on motion or petition in open court.

So, if by a *habeas corpus* in Trinity term returnable *tres Mich.* a prisoner goes into the country with a keeper, for the greatest part of the vacation. *R. 1 Rol.* 808. l. 25. 35. *Hob.* 202. *Cro. Car.* 14.

Or, upon any *habeas corpus* be permitted to go at large in the country. *Semb. Cro. Car.* 14. 3 *Co.* 44. a. *Mo.* 257. 299. *Per Hale*, 1 *Mod.* 116. *Hard.* 476.

Or, if upon a *habeas corpus ad testificand.*, he goes before and stays a long time after the assizes. *Semb.* 1 *Mod.* 116.

[*Habeas corpus ad testific.* is not a defence against action for escape of prisoners in execution ; therefore the court will refuse to grant such, without consent of defendants and warden. Yet such have been granted without affidavit. Barnes, 222.] { But *vide cont.* Noble v. Smith, 5 Johns. Rep. 357. }

[If after judgment, and before any charge in execution, a prisoner is rescued when brought out on a *habeas corpus* ; it is not a good excuse for the sheriff, in an action of escape, and he shall answer it to the plaintiff. P. 7 G. Str. 429.]

[If a prisoner is removed by *habeas corpus* from B. R. to C. B. and escapes, plaintiff in an action of escape need not set out the process in C. B. against the prisoner. T. 6 G. 2. Str. 951.]

Or, if upon a day-rule, &c. he goes to Kensington, the playhouse, &c. Cont. per Pemberton, 2 Sho. 298. Acc. per Raymond and Withens, 2 Sho. 299.

[If a prisoner goes out early in the morning, and did not sign the petition till taken up, though he afterwards has a day-rule. Anon. H. 8 G. Str. 503.]

[The court will not grant a day-rule for a prisoner to go ten miles with a tipstaff, to treat with his creditors. Barnes, 386.]

If he goes into the country by order of the court, *ad colligend. bona pro solutione debiti.* R. Bend. pl. 267.

[*]If brought before a baron, or other judge, by his command, after term. Dy. 296. b. in marg.

So, by the st. 8 & 9 W. 3. 27. if a keeper after a day's notice in writing refuses to shew a prisoner in execution, to him at whose suit he is so, or his attorney.

By the st. 5 G. 24. if he permits a bankrupt to escape, he shall forfeit 500*l.* ; if he refuses to shew him to a creditor on request, 100*l.* ; if convicted again for like offence, 200*l.* (This act is expired ; but 5 Geo. 2. 30. is the same, except the double penalty for second offence.)

So, if a woman, keeper of a gaol, marries her prisoner, it will be an escape ; for a man cannot be in the custody of his wife. Pl. Com. 37. a.

[If the gaoler makes a prisoner in execution turnkey, and he goes out on an errand, and returns, it is a voluntary escape. T. 9 Geo. 2. B. R. H. 310.]

Or, if a keeper in fee dies, and his office descends to the prisoner. Pl. Com. 37. a.

The action lies for an escape ; though the prisoner was arrested upon a *latitat.* 1 Rol. 537. l. 50.

Or, committed by commissioners of bankrupts for not answering to interrogatories. R. Mo. 834. 1 Rol. 47.

Or, in custody of the sheriff upon an attainder for felony, when process at the suit of the party was delivered, upon which the sheriff returned *capi corpus*, and then the prisoner is pardoned, and departs. R. 1 Leo. 276.

[The marshal of B. R. is responsible for the escape of a prisoner charged in execution, although no *committitur* is entered in his book. Ld. R. 704.]

{But quere whether the court would not stay proceedings in an action for such an escape at any time before verdict. Ld. R. 704.]

[Afterwards it would not. Ibid.]

If committed upon a *capias pro fine*, where a *capias ad satisfaciendum* [*590]

lies in the same suit; for then he shall be in execution for the party, without prayer. R. 1 Rol. 810. l. 20. 5 Co. 88. 13 H. 7. 2. Bridg. 7.

Or, upon a *capias utlagatum*. R. 1 Rol. 810. l. 35. Cro. El. 706. 5 Co. 88. R. Cro. El. 652. R. 5 Mod. 200.

Though the outlawry was upon the same process. R. F. g. 265.

Or, upon a *capias pro fine* after prayer, though no *capias ad satisfaciendum* lies. 1 Rol. 810. l. 30. 5 Co. 88.

Or, upon a *capias utlagatum*, &c. where a *capias ad satisfaciendum* lies; though taken after the year after judgment, and no prayer be entered. R. 1 Sal. 319. R. 5 Co. 89. b.

So, escape lies, though taken upon an escape warrant; by the st. 1 Ann. 6.

[If the recaption is after the action brought, it is still an escape. R. on Demurrer, T. 4. G. 2. Str. 873.]

So, an action lies for an escape, where the prisoner was arrested by process out of an inferior court.

Though it be pleaded that the cause of action arose out of the jurisdiction, and that the officer had notice of it before the return of the writ; for the officer cannot examine that matter. R. 7 Ann. (Com. 153.) Vide Courts, (P 15.)

[*] Though the judgment was erroneous. or for one who sued without colour. R. 3 Mod. 324. Carth. 148. Adm. 5 Mod. 413. R. 8 Co. 142. 2 Bul. 63. R. Cro. El. 164. 576. Yel. 42. cont.

So, an action lies for an escape, though he was convicted for felony, before judgment and execution against him, and continued in prison for the felony; for until he be executed for the felony, he is chargeable to the party. R. Sav. 63. 1 Leo. 276. 2 Lev. 84.

[Where a sheriff permits one arrested on mesne process to go at large, without taking a bail bond, and has him not at the return of the writ, in other words, does not put in and perfect bail in due time, it is an escape; nor will the court relieve the sheriff, by permitting him or the defendant to put in and justify bail afterwards. 7 T. R. 109. Id. 239.; at least not after an action of escape commenced against the sheriff. 1 B. & P. 225.]

[Where bail do not justify in time, it is the same as if no bail had been put in; and if the sheriff thereupon sued for an escape, afterwards perfect bail, the allowance will be set aside. 1 Taunt. 119.]

[Where the sheriff has omitted to take a bail-bond, the court will not relieve him from an action of escape by permitting him to render the principal. 6 Taunt. 554.]

[Where the sheriff suffers a person who has been arrested to go at large, without taking a bail-bond, the court will not suffer him to render the defendant after action commenced against him for an escape; though he should not have been ruled to return the writ or bring in the body before action commenced. 2 Mars. 261.]

[If a sheriff lets a defendant, arrested on mesne process, go at large without bail below, and on being ruled to return, the writ returns *cepi*; but no bail is then put in above, the sheriff is liable in an action of escape; and it is not enough that he puts in bail when ruled to bring in the body. 3 Aust. 675.]

[If a prisoner under final process before he is taken to prison, is permitted to go about, though in company and under the controul of the sheriff himself, it is a voluntary escape. 1 B. & P. 24. 2 Blk. 1048.]

[If the sheriff liberate a prisoner taken under a *ca. sa.* on payment of the

debt and costs, he is answerable as for an escape, unless perhaps he pay over the money to the plaintiff immediately. 14 East, 468.]

[If a prisoner in the custody of one officer is, without a sufficient authority, delivered by him over to another, it is an escape. As where the bailiff of a liberty takes a prisoner arrested by him under a writ with the sheriff's mandate thereon, to the county gaol out of the precincts of his liberty. 2 T. R. 5.]

[If the keeper of the sheriff's prison discharge a debtor under the order of an inferior court, not having jurisdiction, the sheriff is liable for an escape. 8 T. R. 424.]

[The court will not stay proceedings in an action for the escape of a certificated bankrupt taken in execution and discharged by the officer, on sight of his certificate. 4 Taunt. 631.]

[An officer is liable for the escape of a prisoner in custody on final process, unless caused by the act of God, or of the king's enemies. 2 H. B. 108.]

[If rebels break into a prison and release the debtors, whether in custody on mesne or final process, the sheriff is answerable. 4 T. R. 789.]

[*][A rescue is no excuse for a gaol-keeper bringing up a prisoner by *habeas corpus*. 5 Burr. 2812.]

{ How far a forcible rescue of a prisoner committed in execution, or arrested, and in custody, on mesne process, will subject the gaoler or officer. *Cargill v. Taylor*, 10 Mass. Rep. 206. }

(D) WHAT NOT,

But it will not be an escape, if the party never was in his custody ; as, if the old sheriff does not deliver him over upon such execution. R. 3 Co. 72. Adm. 2 Cro. 588. Poph. 85. 2 Leo. 54.

If he be arrested, but not actually committed to gaol, the gaoler shall not be charged for an escape. R. 1 Rol. 806. l. 30.

So, if a *committitur* be entered upon the roll, but the party is not taken. 1 Sid. 220.

So, if a man bailed renders himself in discharge of his bail, and a *reddidit se* is entered in the judge's book, and a *committitur* entered with the proper officer ; yet if a *committitur* be not entered with the marshal of B. R. or a rule served upon him, he shall not be charged for an escape, though the bail be discharged. R. 1 Sal. 272, 3.

So, if the entry be that *virtute* of an *habeas corpus* to a judge of B. R. *debito modo commissus fuit mar.* ; for that cannot be by virtue of the *habeas corpus*. R. 2 Sho. 17, 8.

[It must appear that the commitment is of record ; therefore, if it is laid that the prisoner was committed to the custody of the marshal, at the suit of plaintiff, by A. one of the justices of our lord the king, it is ill. P. 18 G. 2. Str. 1226.]

If he be at the house of the gaoler, but not within the prison. R. Cro. Car. 210.

So, it will not be an escape, where the prisoner was not in custody at the suit of the plaintiff ; as, if he was taken by a *capias utlagatum*, or a *capias pro fine* ; where a *capias* does not lie in such suit. 1 Rol. 810. l. 30.

Or, when he was not charged at the prayer of the plaintiff. 1 Rol. 810. l. 30. R. 1 Leo. 263. Vide ante, (C).

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Or, was arrested and suffered to go at large before the writ of execution delivered to the sheriff. 1 Rol. 809. l. 30.

Or, upon a *capias*, where no *capias* was awarded by the court. 1 Rol. 809. l. 35.

Or, upon a *capias ad respondendum*, which was tested in Trinity term, and returnable in Hilary term: for, not being returnable in the next term, it is out of court. R. 1 Sal. 273.

[No objection to the process, which does not prove the process void, will excuse an escape. R. Ld. R. 775.]

So, it will not be an escape, if he goes out of prison, by reason of a sudden fire in the gaol. 1 Rol. 808. l. 7.

Or, the gaol be broke by the king's enemies. Bro. Escape, 10. 1 Rol. 808. l. 5.

Or, the defendant be rescued upon mesne process, before he was in gaol. Mar. 1. 1 Rol. 807. l. 35. R. 2 Cro. 419. 2 Lev. 144. 1 Rol. 389. 440.

Though the rescous be not returned. R. 2 Lev. 144.

Or, if it be. R. 1 Rol. 140.

So, if the defendant be retaken upon fresh suit before the action commenced for the escape. R. 1 Rol. 808. l. 50. R. 3 Cro. 52. R. 13 H. 7. 2. Godb. 434. Gol. 180. F. N. B. 130. B. [Com. 422.]

[*] Though the fresh suit was not begun till a day and a night after the escape. R. 1 Rol. 809. l. 10. 2 Rol. 681. l. 50. 3 Co. 52. Mo. 660. Poph. 41.

Though he did not retake him till he fled into another county. Bro. Escape, 4. R. 3 Co. 52.

Though he was out of sight. R. Poph. 41. 2 Co. 52. 14 H. 7. 1. a.

Though he did not retake him till seven years after, if it was upon fresh pursuit. 13 Ed. 4. 9. a. Semb. Godb. 177.

[So, a voluntary return of a prisoner, after an escape, before action brought, is equivalent to a retaking on a fresh pursuit; but it must be pleaded. 2 T. R. 126.]

But fresh suit is no plea, where the escape was voluntary in the sheriff. R. 2 Rol. 283. Vide post, (E.)

Or, after an action brought, though before plea. Semb. 2 Rol. 283. R. cont. Latch. 200.

So, the sheriff shall not be charged for an escape, if the prisoner goes out of prison with the assent of his creditor; for the st. W. 2. 11. says, *sine assensu domini*. 2 Inst. 382.

Though the assent be only by parol, it shall be a bar. 2 Inst. 382. Dy. 275. a.

But an assent by parol after an escape does not discharge the sheriff. Dy. 275. a. in marg.

So, it will not be an escape, if the sheriff, upon a *habeas corpus*, brings his prisoner to Westminster, though he goes out of the direct way. R. 3 Co. 44. Mo. 299.

If he has a writ to attend upon the court, commissioners, &c. for a day. 1 Ch. R. 67.

Though he does not go to them. Per Pemb. 2 Sho. 289. Cont. if he goes to another place, per Raymond and Withens, 2 Sho. 299. Vide ante, (C.)

So, if he goes with a keeper, to counsel, &c. when he is in execution for the king's debt, though not in the case of a common person, because the gaoler may retake him. R. Sav. 29.

So, if discharged upon an *audita querela*, though the writ be afterwards vacated. R. Mo. 354.

So, if a prisoner, brought by *habeas corpus*, goes out of the custody of the sheriff, and returns the next morning, and appears at the return of the writ. R. Mo. 257.

So, if a prisoner goes out of the rules of the prison, with the consent of the plaintiff, without a keeper or rule of court, upon an intent to agree with the plaintiff, and no agreement is made: yet the prisoner shall be discharged upon an *audita querela*. R. Sti. 117. Semb. cont. if the plaintiff assents upon condition, that it shall not prejudice his execution. Dy. 275. a.

[A sheriff is not bound to carry a prisoner on mesne process to gaol, before the return of the writ, and is not guilty of an escape by omitting so to do after the return, unless the plaintiff is thereby delayed. 5 T. R. 37. 2 T. R. 172.]

[The sheriff's concealing that he has taken a bail-bond, will not support an action for an escape. 5 Taunt. 325.]

[On an arrest under mesne process, it is sufficient if the sheriff produce the body before the rule to bring it in expires. 2 B. & P. 35.]

[*][By putting in bail, as of the term in which the writ is returnable, the sheriff is secured from an action for an escape, even though in point of fact they were put in after the action was commenced, since the particular day never appears, and cannot be inquired into. But putting the bail of a subsequent term will not do. The writ requires the sheriff to put in bail of one term; now, to put it in of another is not to answer its exigency. 4 M. & S. 397.]

[The putting in and justifying bail after an action of escape commenced, in lieu of other bail, who were a nullity, defeats the action. 2 B. & P. 246.]

[The court will not set aside an order for allowance of bail, on the ground of an action having been previously commenced against the sheriff for an escape, though no bail-bond had been taken, nor bail above put in due time after the return of the writ, if defendant has been rendered. 1 Price, 103.]

[It is no escape to take a prisoner in execution to a lock-up-house. 4 Taunt. 608.]

[Since the marshal of the K. B. prison is justified in allowing to prisoners the liberty of the rules, an escape from the rules, without his knowledge, is negligent, and not voluntary. 2 T. R. 126.]

(E) WHEN HE SHALL BE RETAKEN, &c. AFTER AN ESCAPE; AND HEREIN OF VOLUNTARY RETURN.

If the prisoner escapes by negligence of the sheriff, the sheriff may re-take him, and he shall not have an *audita querela*. R. 3 Co. 32. b. R. 1 Sid. 330. Mo. 660. Dub. Sho. 70. Adm. Sho. 177.

Or, he may have an action on the case against the prisoner for his escape; whereby he becomes subject to the action of the party. D. 3 Co. 52. b. Mo. 660. R. Mo. 404. 597. R. Cro. El. 53. 237. 1 Leo. 237. Lut. 64.

And this, before an action or recovery against the sheriff, as well as after. Mo. 660. R. Godb. 125. Cro. El. 53.

Though the party afterwards acknowledges satisfaction upon record: for that goes only in mitigation of damages. R. 1 Leo. 237. Semb. cont. if he does not shew specially how satisfied. Cro. El. 237.

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So, if a prisoner escapes, and afterwards returns to the prison, the plaintiff may admit him in execution, though he has a remedy against the sheriff. Cont. Hob. 202. R. acc. 1 Vent. 269. 2 Lev. 109. 132.

Or, may retake him by a new *capias ad satisfaciendum*, if the first be not returned and filed. R. 3 Co. 52. b.

So, he may retake him in all cases upon a negligent escape; for the sheriff may be insufficient. R. cont. Hob. 202. R. acc. 1 Sid. 330. 1 Vent. 4. 269.

So, though the escape was voluntary by the gaoler. and without his consent. R. 1 Sid. 330. 1 Vent. 4. 1 Lev. 211. 2 Mod. 136. R. 2 Jon. 21. Adm. Sho. 177. Semb. Cont. Hob. 202.

And now, by the st. 8 & 9 W. 3. 27. it is enacted, that if a prisoner in execution in the Marshalsea or Fleet escape by any means, the plaintiff may retake him by *capias ad satisfaciendum*, or sue out any other execution against him, as if never in custody.

Yet, if A. permits a voluntary escape, and quits his office to B., to whom the prisoner returns, B. ought to detain him; otherwise, it will [*] be an escape in him. 1 Vent. 269. 2 Lev. 109. Semb. Mod. Ca. 183. Semb. cont. Hob. 202.

So, if a prisoner be dismissed upon a wrongful *audita querela*, he may be retaken, and shall be in execution. R. Mo. 354.

So, after an escape, the plaintiff may have debt or a *scire facias* against the defendant upon the former judgment. R. 1 Vent. 269. Cart. 212, 2 Jon. 21. R. Lut. 1266. Sho. 174. 249.

Though it was with his consent subsequent. 1 Sal. 271.

Though he paid the money to the gaoler. R. 2 Jon. 97.

And by the st. 8 & 9 W. 3. 27. any other kind of execution.

So, if a man taken in execution be rescued, he may be retaken, or a *scire facias* lies against him. R. Cro. Car. 240.

But, if the sheriff suffers a voluntary escape, he shall not have an action upon the case against the prisoner. R. Mo. 597.

Or, if he retakes him, the prisoner shall have an *audita querela*. 3 Co. 52. b. R. 1 Sid. 330.

So, if the sheriff permits a voluntary escape with consent of the plaintiff, he never can be retaken by the sheriff, or the plaintiff. R. Show. 174. D. 2 Leo. 119.

If the consent of the plaintiff be precedent to the escape; otherwise, if subsequent. R. 1 Sal. 271.

Or, if the office descends to B. R. 3 Lev. 109.

And an action for the escape lies against A. or B., if he also permitted an escape, at the election of the plaintiff. R. 2 Lev. 132.

So, by the st. 1 Ann. 6. if any committed to the queen's bench or Fleet in execution on mesne process, or contempt in not obeying a decree, escape, on oath of it, a judge shall grant a warrant to all sheriffs, mayors, &c. reciting the cause of commitment, to retake him, who shall be committed to the county gaol where retaken, and not delivered on any account, till the debt satisfied, judgment reversed, or contempt discharged, unless removed for treason or felony, and then he shall remain charged with all causes for which he was retaken.

He cannot be brought before a judge by a day-rule as another prisoner may, to shew cause of action against another. R. Mod. Ca. 63.

So, he may be taken upon a Sunday. Mod. Ca. 95. Vide Temps, (B 3.)

But if the party be not taken by lawful authority upon an escape warrant, if this appears upon the return of the warrant, he shall not be committed to

the county-gaol, but to the former prison ; as, if brought, not by a constable or other officer, but by persons not known. Mod. Ca. 154.

[A. resists the service of an order of chancery, is committed for the contempt, goes at large, retaken on an escape-warrant, and committed to Newgate ; escape-warrant superseded, the contempt not being for not obeying a decree, and A. sent to the former prison. Str. 99.]

[If a man escapes and returns again, and then commits a second escape, he cannot be taken up for the first escape, it being purged by his return. Str. 423.]

So, if he be discharged by agreement, after commitment upon an escape-warrant, he shall not be afterwards retaken. Mod. Ca. 254.

[If the defendant was entitled to his discharge at the time of his escape, and would be entitled to it as soon as taken on the escape-warrant, the court will supersede the warrant. Str. 401.]

[*][A man taken upon an escape-warrant of a judge, after his patent is determined, shall be discharged. Ld. Raym. 1513.]

[The voluntary return of a prisoner, after a negligent escape, is equivalent to a re-taking on fresh suit. 2 T. R. 126. Hence, case lies against the keeper of a prison for an escape on mesne process, though the prisoner returns the same day, and the plaintiff proceed to final judgment against him. 2 Wills. 294.]

[A sheriff cannot retake a prisoner whom he has voluntarily set at liberty. 5 T. R. 25.]

[Where a debtor has escaped without the creditors assent, he may be retaken. 1 T. R. 559.]

[If a prisoner escapes, and plaintiff sends an order for his discharge, the gaoler cannot retake him for his fees. Str. 909.]

{ It seems, that after a voluntary escape, the sheriff cannot retake the prisoner ; though he may do so, after a negligent escape. *Lansing v. Fleet*, 2 Johns. Cas. 3. Vide *Thompson v. Lockwood*, 15 Johns. Rep. 256.

In an action for an escape, the sheriff cannot by way of defence, allege, that the judgment is erroneous, or the process irregular ; but when he has arrested a party, he is bound to keep him, until he is discharged by due course of law. *Cable v. Cooper*, 15 Johns. Rep. 152, 155. *Bissell v. Kip*, 5 Johns. Rep. 89. *Scott v. Shaw*, 13 Johns. Rep. 378. *Hinman v. Brees*, 13 Johns. Rep. 529.

Where a prisoner escapes without the knowledge of the sheriff, and returns voluntarily, before suit is brought, it is equivalent to a recaption on fresh pursuit. *Dole v. Moulton*, 2 Johns. Cas. 205. *Drake v. Chester*, 2 Conn. Rep. 473.

But a voluntary return before suit brought is not a defence in an action for an escape, whether voluntary or negligent, on mesne process, after the writ is returned. *Stone v. Woods*, 5 Johns. Rep. 281. }

[Vide Pleader, (2 P 1.)]

ESCHEAT.

(A) AN ESCHEAT.

(A 1.) For want of heirs. p. 596.

(A 2.) For the offence of the tenant. p. 597.

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(B) WRIT OF ESCHEAT.

(B 1.) When it lies. p. 597.

(B 2.) When not. p. 598.

(C) THE OFFICE OF ESCHEATOR. p. 598.

(A) AN ESCHEAT.

(A 1.) For want of heirs.

An escheat is when land falls to the lord of whom it is holden. Co. L. 13. a. 92. b.

Lands escheat *propter defectum sanguinis, vel propter delictum*. Co. L. 13. a.

As, if A. seised in fee, dies without heir, the land escheats to the lord. F. N. B. 143. T. { Vide University of North-Carolina v. Johnston, 1 Hayw. 373. Gilmour v. University of North-Carolina, 2 Hayw. 108. Sewall v. Lee, 9 Mass. Rep. 363. }

Or, seised in tail, remainder to himself in fee. F. N. B. 144. A.

So, if a bastard dies without issue. F. N. B. 144. E.

If the heir be attainted for treason, or felony. Co. L. 13. a.

So, if land descends on the part of the father, if there be no heir on the part of the father, the land escheats. Lit. s. 4.

Or, descends on the part of the mother, if an heir on the part of the mother fails, the land escheats. Lit. s. 4.

If A. be disseised, and then dies without heir, his land escheats, and the lord shall have a writ of escheat against the disseisor. F. N. B. 144. C. Semb. cont. that the lord never shall have a writ of escheat, except where his tenant dies seised. 32 H. 6. 27. a. Vide post, (B 2.)

[If A. devises in fee to B., and if he dies without heir, to C.; the devise shall be void against the lord by escheat. Vau. 270.]

[*][If a man devises to A. to sell and pay debts and legacies, and the residue to B., and A. dies, and the testator has no heirs, the estate escheats to the crown. M. 1741, 2 Atkyns, 223.]

But if a disseisor makes a feoffment or dies seised, whereby the land descends, and afterwards the disseisee dies without heir, the land does not escheat; for the feoffee, &c. is in by title. Co. L. 268. b. Hob. 242.

So, if an annuity, rent-charge, advowson, &c. be granted in fee, and the grantee dies without heir; these do not escheat to the lord, for they are not held of him, but to the grantor. 1 Rol. 816. l. 27. 30.

So, if a corporation be dissolved, their land does not escheat, but goes to the donor. Co. L. 13. b.

[So, where A. by will directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real estates on failure of heirs, the crown was held to have no equity against the next of kin to have the money laid out in real estates; for the purpose of claiming by escheat, the quality of land not having been imperatively fixed on the money; since it might have been invested in land, and still continued personalty. 2 Ves. Jun. 170.]

[Copyholds cannot escheat. Ibid.]

[Whether an equity of redemption, or a trust can escheat, has not been determined. 2 Vesey, 300.]

{ But it seems, that an equitable interest in lands, devised to aliens, may escheat. *Gilmour v. Kay*, 2 Hayw. 108.

And it seems also, that the legal title may escheat, incumbered with a trust. *Marshall v. Lovelass*, Cam. & Nor. 257. 277. *et seq.*

Where there is failure of inheritable blood, by reason of alienism, lands do not escheat, but will descend to the next heir of the person last lawfully seised. *Jackson v. Jackson*, 7 Johns. Rep. 214. *Orr v. Hodgson*, 4 Wheat. 453. Vide *Davis v. Hall*, 1 Nott & M'Cord, 292.

As to the power of aliens to take and hold lands, Vide *Fairfax's Dev. v. Hunter's Les.* 7 Cranch, 619. *Craig v. Radford*, 3 Wheat. 594. *Orr v. Hodgson*, 4 Wheat. 453. *Sewall v. Lee*, 9 Mass. Rep. 363. *Doc v. Hor-niblea*, 2 Hayw. 37. }

(A 2.) For the offence of the tenant.

So, if a man seised in fee be attainted for treason or felony, the land escheats to the king, or the lord of whom it was holden. Vide *Forfeiture*, (B 1, &c.)

When the forfeiture or escheat belongs to the king, vide *Forfeiture*, (B 5.)—*Prerogative*, (D 59, 60.)

Escheat for treason or felony happens in three cases; *quia suspensus per collum, quia abjuravit regnum, vel quia utlagatus est.* Co. l. 14. a.

And, if a man has judgment to be hanged, his land escheats though he dies before execution, and the writ shall say, *quia suspensus.* F. N. B. 144. H.

But if the felony be pardoned before attainder, the land does not escheat to the lord. Ow. 87.

So, if *cestuy que trust* dies without heir, the lord shall not have the trust by escheat; for the feoffee continues tenant to the lord, and shall hold the lands discharged of the trust. Hard. 496.

(B) WRIT OF ESCHEAT.

(B 1.) When it lies.

A writ of escheat lies by the lord, when his tenant in fee simple dies without heir. F. N. B. 143. T. { Vide *University of North-Carolina v. Johnston*, 1 Hayw. 375. *in nota.* }

And if the lord dies before the writ sued, his heir shall have it. F. N. B. 144. D.

So, the successor of an abbot, bishop, &c. F. N. B. 144. L.

So, tenant for life of a seignior, or by curtesy, or in dower. F. N. B. 144. M.

[*]So, if tenant in tail with the fee expectant to himself, dies without heir, the lord shall have a writ-escheat; for the tenant in tail held his reversion of him. F. N. B. 144. a.

Or, if tenant in fee be disseised, and afterwards dies without heir. F. N. B. 144. C.

A writ of escheat lies, though the lord accepts the rent of him in possession. F. N. B. 144. O.

And the process shall be summons, *grand cape* and *petit cape*, as in a *præcipe quod reddat.* F. N. B. 144. O.

{ An absolute title to lands is not vested in the public, until office found. *Den v. Simpson*, Cam. & Nor. 192. *Marshall v. Lovelass*, Cam. & Nor.

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233. *M'Creery v. Allender*, 4 Har. & M'Hen. 409. *Doe v. Horniblea*, 2 Havw. 37. *Fairfax's Dev. v. Hunter's Les.* 7 Crauch, 603. *Craig v. Radford*, 3 Wheat. 594. }

For the proceeding in escheat, vide *Pleader*, (3 C.)

(B 2.) When not.

But if tenant in tail dies without issue, he in reversion or remainder shall not have a writ of escheat, but a formedon. F. N. B. 144. A.

So, if he in remainder after an estate for life dies without heir, and then the tenant for life dies, the lord shall not have a writ of escheat, but intrusion; for the tenant for life was tenant to the lord. F. N. B. 144. B.

So, if the tenant be disseised, and dies without heir, when his entry is congeable, the lord shall not have a writ of escheat; for he never shall have a writ of escheat except where his tenant dies seised; but he may enter. 32 H. 6. 27. a.

If the entry of the tenant was not congeable, he cannot enter, nor have a writ of escheat. 32 H. 6. 27. a.

So, if the lord accepts any corporal service; as, homage or fealty of him in possession, he shall not afterwards have a writ of escheat. F. N. B. 144. O. Co. L. 268. a. 4 H. 6. 21. a.

Though it be accepted of a disseisor. Co. L. 268. a.

So, if he avows in a court of record for rent due from the tenant, or disseisor. Co. L. 268. a.

Or, accepts rent of the heir or feoffee of the disseisor, where the descent or feoffment was after the escheat. Co. L. 268. a.

But, if the lord accepts rent of the tenant, this does not bar him of a writ of escheat. Co. L. 268. a. 4 H. 6. 21. a.

So, though he accepts rent of the disseisor, his tenant. Co. L. 268. a.

(C) THE OFFICE OF ESCHEATOR.

By the common law there were two escheators, the one *ultra Trentam*, and the other *citra Trentam*, who had sub-escheators, and to whom it belonged to inspect the escheats, wards, and other casualties which fell to the crown. Co. L. 13. b. 92. b.

In the time of Ed. 2. there was an escheator constituted in each county for life; and so it continued until the time of Ed. 3. Co. L. 13. b.

By the st. 14 Ed. 3. 8. an escheator was appointed by the treasurer for each county; and ought to continue only for a year.

By the st. 1 H. 8. 8. he should not be named, who was an escheator within three years before.

The mayor, &c. of a city, &c. may be an escheator, by grant, or prescription. R. Ley, 5.

By st. 4 Ed. 4. the mayor of London *pro tempore* is constituted escheator within Southwark. Hard. 11.

An office, taken by an escheator out of his precinct, will be void. Semb. Hard. 12.

[*] ESCUAGE.

Vide HOMAGE, (E).

ESGLISE.

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(A) A CHURCH, HOW ERECTED.

The nature of an advowson of a church, appendant, or in gross, and the grant of it, or of the next avoidance. Vide in Advowson, (A—B—C 1, 2.)

The appropriation, or union of churches. Vide in Advowson, (D 1, &c. —E—F 1, 2.)

By the common law any one might build a church in his soil, without licence of the king, or any other. 3 Inst. 201.

And this privilege was claimed by the barons of the realm. Seld. de Dec. 360. Dub. Cod. Ju. Eccl. 212.

[*]But it shall not be taken as a church, till it be consecrated by the bishop. 3 Inst. 203. Seld. de Dec. 85.

And this was decreed by a council under Wilfrid, archbishop of Canterbury, anno 816. Seld. de Dec. 261. c. 9. s. 4.

And afterwards by the canon anno 1102, no church can be erected without endowment. D. of Pluralities, 80. Cod. Ju. Eccl. 212.

So, by the canon law, none can build a church without licence of the bishop. Co. Ju. Eccl. 212.

(B) A CATHEDRAL.

A church is either major, as a cathedral; or minor, as a parish-church, &c. Lind. 9.

The cathedral is the see of the bishop. *sedes episcopi*. 2 And. 168.

And cannot be conveyed to another, without the bishop. Qu. 2 And. 168.

The king by his patent may create a church *et ambitum ecclesiæ*, a cathedral. Jon. 166.

(C) A PARISH CHURCH.

About the year 700 the Saxons, in large districts, founded churches for themselves and their tenants; which were the original of parish-churches. Seld. de Dec. 259. c. 9. s. 4.

Within those districts other churches were afterwards erected, which in process of time have obtained tithes, burial, and baptism, and thereby become parish-churches. Seld. de Dec. 262. c. 9. s. 4. D. of Plu. 92.

And therefore, every church, having burial, baptism, and tithes, is now esteemed a parish-church. Seld. de Dec. 265. c. 9. s. 4.

Or burial, *et sacramentalia*. 2 Inst. 363.

A VICARAGE.

As to a vicarage, vide Ecclesiastical Persons, (C 10, &c.)

(D) A CHAPEL.

A church built within the precinct of a parish-church, to which burial and sacraments belong, is a chapel of ease. 2 Rol. 340. l. 50.

And it belongs to the parish-church, and the parson of it. 2 Rol. 341. l. 2.

And therefore, a parish-church cannot be a chapel. 2 Rol. 340. l. 55.

The parson of a parish-church ought to find a chaplain for a chapel of ease within his precinct.

But he may officiate there himself.

[If a chapel has parochial rights, as clerk, wardens, &c.; rights of divine service, as baptism, sepulture, &c.: and the inhabitants have a right to them there, and not elsewhere, and the curate has small tithes and surplice-fees, and an augmentation: it is a perpetual curacy, and the curate is not amovable at pleasure. 2 Vesey, 425.]

[Nomination to a perpetual curacy may be by parol, as well as presentation to a church. Ibid.]

[*](E) THE CHURCHYARD.

The cemetery *circa ecclesiam majorem 40 passus, circa minorem 30 continere debet*. Lind. 253. verb. Claus. Cemeterii, 267. verb. Cemeteriis.

As to the churchyard, the privileges, and burial there. Vide Cemetery.

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(F) CHURCHWARDENS.

(F 1.) How chosen.

By the canon 1°, Jac. 89. all churchwardens shall be chosen by joint consent of the minister and parishioners, if it may be ; but if they cannot agree, the minister shall choose one, and the parishioners another.

And, by common right, the election ought to be by the whole parish. Hard. 379.

[Of common right the parson shall choose one, and the parishioners the other. H. 19 G. 2. Stra. 1246.]

[A curate stands in the place of the parson for the purpose of nominating one churchwarden, and a curate may make a presentment. Ibid.]

By canon 90. the election shall be yearly in Easter week.

[If the parson and parishioners neglect, yet the ordinary has no jurisdiction ; the proper way is *mandamus* e B. R. E. 3 G. Str. 52.]

If the bishop, or ecclesiastical court make an order that a select vestry shall chuse, this does not exclude the other parishioners, if they will be present at the vestry. R. Lane, 21.

But, by custom, they may be chosen by the parishioners, without the parson. R. 2 Rol. 234. l. 15. 2 Cro. 532.

If they are incorporated to be chosen by the parishioners, they ought to be chosen by all the parishioners assembled. R. Lane, 21.

[The parson or vicar cannot adjourn the vestry, but the majority of the parishioners. T. 9 & 10 G. 2. Fort. 168. Str. 1045. B. R. H. 274.]

So, by custom, the election shall be by a select vestry, and not by the whole parish. R. Hard. 379.

[Where there is a custom for chusing churchwardens, and it cannot take place, they must resort to the canon. H. 5 G. Str. 145.]

So, for misbehaviour, the parishioners may discharge them, and chuse others. Lamb. ch. sect. 3.

By the canon 1°, Jac. 89. they shall continue in office but one year, except chosen again in like manner.

But, by can. 118. they shall be reputed to continue till new churchwardens sworn.

The churchwarden being chosen, cannot be refused by the archdeacon, or spiritual court, on pretence of poverty, or other inability. R. 1 Sal. 166. 5 Mod. 326.

[The right of naming a churchwarden cannot be tried in court-christian. 1 Bl. Rep. 28.]

[The bishop's court cannot try the legality of votes for a churchwarden. 3 B. M. 1420. 1 Bl. Rep. 430.]

And if he be refused, a *mandamus* lies for swearing him. Vide *Mandamus*.

[*]Churchwardens may be required by the spiritual court to take an oath.

But no oath shall be required of them except in general to execute their office. Hard. 364. Vide *Prohibition*.

Nor, can a fee be demanded for swearing them, or taking their presentments. R. 1 Sal. 330.

And attorney of B. R., &c. may have a writ of privilege to excuse him ; and if it be not obeyed by the spiritual court, a prohibition. 2 Rol. 368.

So, if any who has privilege be chosen, a writ goes to the ecclesiastical court that he be not sworn. R. Pal. 392.

Churchwardens, are lay-persons, though ecclesiastical officers. Per Hale, Hard. 379. (Vide 2 Rol. 71. 1 Sal. 166. 5 Mod. 326.)

(F 2.) Their duty, and accounts.

By the canon 1°, Jac. 89. they shall in a month after the end of the year give account of all monies received and disbursed, and deliver up to parishioners what is in their hands. Vide post, (F 3.)

By canon 90. they shall see that all parishioners resort to divine service, and continue the whole time; and present those remiss, &c.

By the st. 2 & 3 Ph. & M. 8. and 5 El. 13. they are to receive and bestow on the highways in the parish the forfeiture collected by the bailiff or head constable, for defaults of repairing highways.

By the st. 1 El. 2. they are to levy 12*d.* forfeited for not resorting to the parish-church, &c. to the use of the poor, by distress upon the goods or lands of the party.

By the st. 43 El. 2. they, (and the overseers) are to set the poor to work, and to raise by taxation of every inhabitant, parson, vicar, occupier of lands, houses, tithes, coal mines, or saleable underwood, a stock of materials, and also money for the relief of the impotent poor, and to put out poor children apprentices; and may levy such rates by warrant from two justices upon the party's goods, and in four days after the end of the year shall account, and deliver over the money, &c. in their hands to their successors.

[There cannot be a rate to reimburse churchwardens. B. R. H. 381. And. 11. 2 Ld. Raym. 1009.]

[But where an overseer is in advance for the parish, he may get a rate for the relief of the poor, and reimburse himself out of the money thereby raised. 2 Ld. Raym. 1009.]

[And the justices are compellable to sign and allow such rate. Ibid.]

[A rate cannot be made to repay money borrowed to repair and rebuild a workhouse. Dougl. 115.]

[A private act enabled the overseers, &c. to make a rate for the relief of the poor, and to include in it such just and reasonable sums as they shall be put to in the execution of their offices; they made a rate, the title of which expressed it to be for both those purposes; and B. R. would not quash it, though the sessions on an appeal stated in a case that it was partly made to pay a debt incurred by the late overseers, the rate itself appearing on the face of it to be legal. 5 T. R. 346.]

[If a parish consist of several vills, and there is a custom to levy the rates in certain proportions, they must pursue it, whether reasonable or not. Andr. 32.]

[*]By the st. 1 (or 2) Jac. 9. they are to levy the penalties upon ale-house-keepers, &c. for suffering tippling in their houses, &c. by distress on the offender's goods.

By the st. 3 Jac. 4. they are yearly to present the monthly absence from church of popish recusants, and the names and age of their children, and the names of their servants at the general or quarter sessions, under the penalty of 20*s.* for every default.

They may take off the hat of any who wears it in church at the time of divine service, without a prosecution in the spiritual court. R. 1 Sand. 13. 1 Lev. 196. 1 Sid. 301.

Churchwardens for neglect of their duty may be sued in the spiritual court.

As, if they take the bells out of the church. 1 Sid. 281. 2.

Or, an action lies against them by their successors. 1 Sid. 282.

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So, an indictment lies, if they take money, &c. *corrupte colore officii*, and do not account for it. R. 1 Sid. 307.

So, they may be removed for misbehaviour, and others chosen before the year expires. Lamb. Off. Ch. sect. 3.

But, to a suit in the spiritual court to compel them to account, after account allowed by the minister and parishioners, a prohibition lies. R. 2 Rol. 71.

[The spiritual court has no jurisdiction to settle a churchwarden's accounts. Str. 1133.]

[It may compel them to deliver in their accounts, but cannot decide on the propriety of the charges; and if it take any steps, after the accounts are delivered in, it is an excess of jurisdiction, for which a prohibition will be granted, even after sentence. 3 T. R. 3.]

And no suit shall be against them by their successors for a thing done *ratione officii*. R. Godb. 279.

(F 3.) Their power and perpetuity.

Churchwardens may maintain trespass, or other action possessory, against any who wrongfully take the bells, books, or other goods of the church; for though the property is in the parishioners, the custody and possession belong to them. R. 11 H. 4. 12. a. R. 1 Rol. 57. Vide ante, (F 2.)

[As to whether churchwardens are a corporation, see 6 T. R. 396.]

[As to suits by, when *de facto* only. 2 H. B. 559.]

[As to their liabilities for money not paid over, see *ibid.*]

Though another parishioner, or the vicar himself, takes them. R. 11 H. 4. 12. a.

Though the goods were bought by the parishioners themselves; for when they are given into the custody of the churchwardens, an action lies by them. 11 H. 4. 12. a.

And the declaration may be *ad damnum ipsorum*, or, of the parishioners. R. Cro. El. 179. 8 Ed. 4. 6. b. Dal. 105. Vide infra.

So, they may have an appeal of robbery for such goods stolen. 12 H. 7. 27. b.

So, they ought to have the action; for a suit for them by the parson in the spiritual court shall be prohibited. R. 1 Rol. 57.

The declaration may be, that they were possessed *de bonis ecclesiæ*, or *parochianorum*. Dub. 1 Vent. 89.

[*]And the succeeding churchwardens shall maintain trespass, &c. for goods taken in the time of their predecessors. 12 H. 7. 28. a. R. Cro. El. 145. 179. Dub. Dal. 105. R. 1 Leo. 177.

But the trespass ought to be alleged in the declaration only *ad damnum parochianorum*. R. Cro. El. 179. [H. 9 Geo. 1. in Canc. MSS. 4 Vin. Abr. 525.] Vide supra.

And if one releases, it does not bar his companion. R. 2 Cro. 234. Yel. 173.

So, if goods are given to a parish or church, the churchwardens may take them; for they are a corporation for such purpose. 12 H. 7. 29. a.

And the successors may have account for them against their predecessors. 8 Ed. 4. 6. b. 1 Vent. 89.

So, if goods are put into the church to be there used; for that is a gift. Lamb. Ch. sect. 2.

So, churchwardens may have an action against any one who defaces a monument, &c. Godb. 279.

But churchwardens cannot purchase or take lands given to the use of the parish ; for they are not a corporation for lands. R. 12 H. 7. 29. a. 1 Rol. 393. l. 10.

Neither can they make a lease of lands given to feoffees for the use of the parishioners. R. 12 H. 7. 29. a. 13 H. 7. 10. a.

Nor, maintain trespass or other action for entry, or taking the profits of such land. 12 H. 7. 29. a.

Or, for breaking the windows, walls, &c. of the church, or cutting down trees in the churchyard.

Yet by the custom of London, churchwardens are a corporation to purchase and demise lands. 2 Cro. 532. Jon. 439.

So, churchwardens cannot sue for a legacy, or a thing never in their possession, by action at common law.

[Churchwardens cannot commence a suit after their year is expired. Str. 852.]

So, one only cannot dispose of the goods, without his companion. 2 Cro. 234.

Nor both together ; for the law does not give them power to do any thing to the disadvantage of the church. 13 H. 7. 10. a. Yel. 173. R. 1 Rol. 393. l. 20. 1 Rol. 426.

Yet a disposition by them, with the consent of the parish, shall be good. 1 Rol. 393. l. 26.

Or, the sending a bell, with consent, to be cast, shall be a discharge upon account, though no bar to an action. R. 1 Vent. 89.

[It seems, appointment of parish clerk needs not be in writing. Loft. 434.]

(G 1.) TO WHOM THE FREEHOLD OF THE CHURCH BELONGS.

The soil and freehold of the church and churchyard belong to the parson. 2 Cro. 367. Vide Ecclesiastical Persons, (C 9. 14.)

And therefore, the parson alone may give a licence for burying in the church. R. 2 Cro. 367. Noy, 104. Vide Cemetery, (B).

So, he may make a lease of the church and churchyard. 2 Rol. 337. l. 10.

[*]And shall have the trees growing in the churchyard for the repair of the church.

(G 2.) To whom the repairs and ornaments.

By the custom of England, the repair of the chancel belongs to the parson. 2 Inst. 489. 1 Sal. 165.

Or, if there be a perpetual vicar, to the vicar. 2 Rol. 337. l. 15.

But, by custom, the repair of the chancel as well as of the church, in London, belongs to the parishioners. Per Holt, 1 Sal. 165. Lind. 53.

The repair of a private chapel belongs to the owner : though it be annexed to the church. 2 Inst. 489.

So, by the custom of England, the repairs *in nave ecclesiæ* belong to the parishioners of the same parish. 2 Inst. 489. 653. Lind. de Off. Archid. 53.

[A rate to reimburse churchwardens for money expended in repairing the church, is bad. 12 East, 556.]

[A church is built pursuant to stat. 9 Ann, c. 22. and a parish divided and taken from another parish, pursuant to stat. 10 Ann, c. 11. s. 8. but no perpetual division of the parishes is made pursuant to s. 22. Semble, that

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under that act, the rates therein mentioned are to be joint. 4 M. & S. 250.]

So, the repair of a public chapel annexed to a church. 2 Inst. 489.

So, the parishioners are to find ornaments to the church, as well as other repairs; as, bells, seats, &c. 2 Inst. 489.

The inhabitants of a chapelry, who antiently repaired the church, shall not be exempted by disusage. R. 1 Sal. 164.

If men usually repair a chapel of ease, and have divine service there, but have burial in the mother church: they are not by that excused from the repair of the mother church. R. 2 Rol. 289. l. 50. Hob. 66. Semb. 3 Mod. 264.

If a man resides in one parish, and occupies land in another parish, he shall be charged to the repair of the church where the land lies; for he is a parishioner there, and may resort to the parish meetings. R. 5 Co. 67, Cro. El. 659. R. 2 Rol. 289. l. 20.

So, to bells; for they are as necessary as the repair of the steeple. R. 1 Sal. 164.

If the major part of the parish at a vestry agrees to make repairs, the others are bound.

Though it be to find ornaments; as, new bells, &c. R. 2 Rol. 291. l. 20. 1 Sal. 164.

But a rate made only by the churchwardens is not sufficient. R. 1 Sal. 165. Dub. 1 Vent. 367. if the parish refuse.

[Churchwardens, with consent of ordinary, may ornament a church (as by erecting an organ) with consent of the parish. 3 B. M. 1689.]

[But the parish are not bound to repair such, when set up. 3 B. M. 1689.]

[A select meeting or vestry does not bind the parish, without immemorial usage. Ibid.]

But for ornaments a parishioner is liable only in respect of his personal estate. R. 2 Rol. 291. l. 5.

So, for ornaments *de novo* which were not antiently there, an inhabitant of another parish is not chargeable, though he occupies land [*]there. R. 2 Rol. 291. l. 10. Per two J. Bul. 20. cont. by the canon law. Deggs, part 1. ch. 12. R. 3 Mod. 211.

Nor, for any ornaments. R. 1 Rol. 291. l. 10.

Yet for bells he shall be charged; for they are as necessary as the steeple itself. R. Sal. 164.

So, a man shall not be charged to the repair of the church, in respect of land which he has in another parish. R. 5 Co. 67. R. 2 Rol. 289. l. 30.

Nor, in respect of rent of land in lease to another in the same parish; for there is another inhabitant chargeable for it. R. 5 Co. 67. b. R. 2 Rol. 289. l. 25. 4 Mod. 148.

So, he shall not be charged for a stand in a market in the same parish, when he inhabits in another parish. R. 2 Rol. 289. l. 35.

[A man shall not be charged to the repairs of a church, in respect of a light house. Bunb. 81.]

So, the inhabitants of an hamlet, who have a chapel of ease, may prescribe to be discharged from the repair of the mother church. R. 2 Rol. 290. l. 22. Hob. 67. Acc. 2 Lev. 102.

As, if they repair the chapel and the wall of the churchyard at the mother church. R. 2 Rol. 290. l. 30.

Or, contribute 3s. 4d. yearly to the repair of the mother church. R. 2 Rol. 290. l. 45.

So, if they have repaired the chapel, and have used to marry and bury [*607]

there, and never repaired the mother church. Semb. cont. 2 Rol. 290. l. 10. R. acc. 1 Sal. 165.; for then it shall be deemed coeval with the church.

So, if they repair the chapel, and have divine service, sacraments, a chapel-warden, and seats there, and nothing in the mother church, but burial in the churchyard. Semb. 2 Lev. 186.

(G 3.) The seats.

The disposal of all seats *in nave ecclesiæ* belongs to the ordinary. Adm. 8 H. 7. 12. Per Co. Godb. 200. 2 Bul. 150.

And, generally, the ordinary may place or remove persons there at his pleasure.

A prescription by the parishioners to dispose without the interposition of the ordinary, will be void. 1 Sal. 167. R. 2 Lev. 241.

So, if a chapel to a monastery, after the dissolution, has always been used there as a parish church, the ordinary may have the disposition of the seats there, though he had it not originally.

So, if an aisle of a church be always repaired at the common charge of the parish, the ordinary may dispose of the seats there. 2 Cro. 366.

But a man may prescribe for the sole enjoyment of a seat in an aisle, or choir of a church. R. 3 Inst. 202. 2 Rol. 288. l. 10.—R. if he has used to repair it. 2 Cro. 366. R. Mo. 878.

So, for a seat in a chancel. Noy, 133.

So, for a seat *in nave ecclesiæ*. Hob. 69. R. cont. Mo. 878. Acc. 1 Sid. 89. Godb. 200.

So, for the first, second, or other place in the seat. Noy, 133, 78. 1 Sid. 89.

So, for a seat in an aisle of a church of another parish. R. 1 Sid. 361.

[*]So, a custom, that the churchwardens repair and make new seats, when there is occasion, and, with the consent of twelve parishioners, place or displace the inhabitants there according to their quality, at their discretion, shall be good against the ordinary. R. 2 Rol. 24.

And if a man be disturbed by the parson, ordinary, or churchwardens by suit in the spiritual court, he may have a prohibition. 2 Cro. 366. R. Godb. 200.

So, if he be disturbed by them or any other, he may have an action upon the case. 2 Cro. 605. R. 1 Sid. 88. 203. 1 Lev. 71. R. 2 Jon. 3. R. 2 Lev. 193. R. 3 Lev. 73. Vide Action upon the Case for a Disturbance, (A 3.)

[But possession alone of a pew in a church, though for above sixty years, is not a sufficient title to maintain an action on the case, even against a wrong-doer for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right or a faculty: and should claim it in his declaration, as appurtenant to a messuage in the parish. 1 T. R. 428.]

[But possession for a length of time, as for thirty-six years, where the pew is claimed as appurtenant to a messuage, is a good presumptive evidence of a faculty. Ibid. 431.]

[Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson. Id. 430.]

Yet, to entitle himself to a prohibition, he ought to suggest some ground for such a prescription; as, repair. R. Hob. 69. R. 2 Cro. 366. Noy, 104. R. 1 Sid. 89.

Or, for a seat in the chancel, that he has the rectory impropriate; for the rector ought to repair the chancel. Noy, 133.

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So, in an action on the case, though he need not allege an usage to repair in the declaration, yet he ought to give it in evidence at the trial. R. 1 Sid. 88. 203. Lev. 71. R. that he need not allege it in the declaration. 2 Jon. 3. R. 3 Lev. 73.

[In an action against a stranger for disturbing plaintiff in his pew, he need not lay, nor prove if laid, that he has repaired; for possession is sufficient: but if the dispute is with the ordinary, title or consideration must be laid and proved. P. 25 G. 2. 1 Wils. 326.]

Yet a prescription for a seat as to his manor, where he has no house in the parish, is not good, though an usage to repair be suggested. Semb. 2 Mod. 283. (Vide Hob. 69.)

As to burial in the church, or churchyard, vide Cemetery, (B).

So, as to tombs, monuments, &c. Ibid. (C).

[It seems that there can be no title to a pew under a faculty, unless as annexed to a house in the parish; which it may be now, by a faculty as well as by prescription, since that supposes a faculty. Even allowing that a faculty in gross is valid, the privilege it confers is personal to the grantee, and incommunicable to others, whether strangers or his representatives; consequently, a faculty to a man and his heirs, will expire with him. 1 T. R. 428.]

[It seems that if a pew is claimed, not as appurtenant to a messuage, but in gross (supposing that it may be so claimed), the faculty granting it must be produced, and its existence, though after a possession of sixty years, will not be presumed. 1 T. R. 428.]

[*][A pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish.—Quere, as to a pew in the body of the church? Forrest. 14.]

[After thirty-six years enjoyment of a pew in an ancient church, as appurtenant to an ancient messuage, a prescriptive right will be presumed, though it be proved that for two years before the first occupation, the pew was unappropriated and considered common; since the party must be supposed to have taken, or been put into possession under an immemorial right. 1 T. R. 431.]

[If a church is pulled down and rebuilt, the prescriptive rights to pews are appurtenant as before. 1 T. R. 431.]

(H) PRESENTATION TO A CHURCH.

(H 1.) What are presentative.

Before the time of king John, the king and other founders of abbies and priories used to present the abbots and priors. 2 Rol. 342. l. 20.

But by king John, abbots and priors, as well as bishops, were made elective. 2 Rol. 342. l. 23. Co. L. 134. a.

So, there may be a presentation to a deanery. 2 Rol. 342. l. 32.

To an hospital. 2 Rol. 342. l. 33.

To a parish-church.

To a chapel. 2 Rol. 342. l. 34.

To an archdeaconry. 1 And. 241.

To a prebend; for if they are in a layman, he ought to present to them.

But there is no need of a presentation to a donative. Vide Donative.

So, if a bishop be seised of an advowson, and the church becomes void; the bishop shall not present to another, but shall make collation himself. 11 H. 4. 9.

(H 2.) By whom it shall be.—Who shall be patron.

A presentation, regularly, ought to be made by the very patron.

As, if a man be seised of an advowson in fee, in tail, or for life. Vide Advowson, (A).

Or, has a grant of the next avoidance. Vide Advowson, (C 2.)

[If mortgagee in fee presents to a living, a court of equity will interrupt that presentation, and compel the ordinary to institute the clerk of the mortgagor, at any time before foreclosure. Str. 403.]

[The court will order the mortgagee of a perpetual advowson to present the nominee of the mortgagor, if he will bring the money into court, or give security to redeem. Bunb. 130.]

[The mortgagee of a naked advowson must accept of the nominee of the mortgagor, and present him on an avoidance. 3 Atkyns, 559.]

If a man, seised of an advowson in fee, be also parson of the same church, and dies, his heir shall present, though the church became void at the time of the descent; for where two titles concur in the same instant, the elder shall be preferred. R. 3 Lev. 47.

[The right of donation descends to the heir; and the executor has no title where testator was seised of the advowson of a donative. 2 Wils. 118.]

[*]But, if the patron dies after the avoidance happens, his executor or administrator shall present, and not the heir.

So, if a feme-covert dies after the avoidance of a church, which she has, her husband shall present. Co. L. 120. a.

If a villein purchases an advowson, his lord, after avoidance, may present, without a prior entry. Co. L. 120. a.

By common right, the parson, and not the patron of the parsonage, shall be the patron of vicarage. 2 Rol. 336. l. 7. 30. 1 Rol. 231. l. 3.

So, if a church be appropriated, the parson appropriate shall be patron of the vicarage; for he is founder, the vicarage being derived out of the parsonage. 2 Rol. 336. l. 12. 25. Cont. per Ld. Chan. 1 Ver. 42. But there was a lessee of a parson impropriate.

Yet a layman may be a patron of a vicarage. 2 Rol. 336. l. 20.

And the same person may be patron of the parsonage, and also of the vicarage. 2 Rol. 336. l. 22.

So, by prescription, a vicarage may be appendant to a manor; for perhaps, by grant of the parson or composition, it was annexed to the manor before time of memory. R. 2 Rol. 336. l. 30. 1 Rol. 231. l. 6.

Or, parishioners may prescribe to chuse a vicar. 2 Rol. 304.

If a vicarage becomes void in the time of the vacation of the parsonage, the patron of the parsonage shall present. 2 Rol. 346. l. 5.

So, by common right, the bishop is patron of all his prebends. 3 Co. 75. b.

And of a provendry, deanery, &c. within his bishopric. 2 Rol. 346. l. 3.

And the archbishop of the deanery of his archbishopric. 2 Rol. 345. F.

[But the right of election to the office of a canon residentiary in Chichester church, is in the dean and chapter; and the bishop cannot, under pretence of his visitatorial authority, present to the office by lapse. 1 T. R. 652.]

[If trustees have a right to elect and present, all must join, or it is not good in law. 1 Vesey, 413.]

[If the trustees being equally divided between A. and B., there is no election; and on the death of one who voted for A., those who voted for B. being a majority, including proxies, meet without notice, and sign a presenta-

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tion to B. ; a court of equity will not order the other trustees to sign it. *Ibid.*]

[If trustees have been appointed by a decree to elect and present a minister, the right of election shall not again devolve to the parish at large ; popular election being the worst way of nominating, and what all courts should, if possible, avoid. *Ibid.*]

[On application to this court, it will direct a meeting to fill up trustees ; the first named trustee to give notice fourteen days after avoidance to all the trustees to meet and elect : if all the trustees were dead, the court would direct new ones. *Ibid.*]

[Though such minister elected was, by an antient decree, to be approved of by assistant preachers ; yet if that has been long disused, the court will not require it. *Ibid.*]

[*](H 3.) *Presentation in turn.*

Parceners seised of an advowson may join in presentation. Co. L. 166. b. 186. b.

And if they cannot agree to make presentation jointly, they ought to present severally in turn. 2 Rol. 346. l. 20.

[If two parceners cannot agree in one person, the court of chancery will direct them to draw lots who shall have the first presentation. 2 Atkyns, 482.]

[Prerogative presentations are not turns to deprive a patron of his turn. 3 Wils. 214.]

The eldest parcener shall have the first turn. Co. L. 166. b. 186. b. 2 Rol. 346. l. 20.

And this privilege goes to her heir. Co. L. 166. b. 186. b.

Or, her assignee. Co. L. 166. b. 186. b.

And if she takes husband, and dies after issue born, whereby her husband is tenant by the curtesy, it goes to the husband. Co. L. 166. b. 16. b. Cro. El. 19.

[If two sisters parceners present jointly, then marry, and settle their estates, and die ; the husband of the eldest, tenant by the curtesy, shall present first, as assignee ; for the grantees of parceners have the same privileges as the parceners themselves. 1 Vesey, 340.]

So, if two parceners assign their parts of an advowson severally, they may present by turn : for they are not mere tenants in common. R. Cro. El. 19.

But parceners may make a composition to present out of turn.

[A. has two turns, B. one ; A. is to present to the first turn, but it is not said who is to present to the second or third. A. presents to first and to second : it shall be presumed it was by agreement ; and B. shall present to the third. 3 Wils. 214.]

And, if upon partition the whole advowson be allotted to the youngest, she alone shall present.

Though the partition was in Chancery, and one within age : for it is good till it be defeated. 2 Rol. 346. l. 45.

And if the partition be avoided, they may afterwards present in turn, or by composition. 2 Rol. 347. l. 5.

Yet, a composition to present out of turn, does not bind without deed. 2 Rol. 346. H.

If there be parceners, one of full age, and the other within age and in ward of the king ; the king shall have the presentation, or first turn. 2 Rol. 343. l. 41. Sho. 208.

If the eldest parcener joins with one of the other parceners in a presenta-
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tion, the bishop may refuse all, when the other parcener, who did not join with the eldest, also presents, and need not take the presentee of the eldest; because she did not present severally. Co. L. 186. b.

So, joint-tenants and tenants in common may join in presentation. Co. L. 186. b.

And if they present severally, the ordinary may refuse to admit their clerk. Co. L. 186. b.

So, if one only presents, without the others. Co. L. 186. b.

So, joint-grantees of the next avoidance ought to join in presentation.

And if one alone presents, the ordinary may refuse. 2 Rol. 348. l. 45.

[*] Yet where there are three grantees, and two of them present the other who is a clerk, the ordinary cannot refuse him; for he cannot join in a presentation of himself. 2 Rol. 348. l. 40.

[If A. and B. co-parceners in an advowson, do not agree to present on a vacancy, A. the eldest, or her assigns, may present to the first turn, and B. or her assigns, to the next. 1 H. B. 412.]

[Semble, that where the right of presentation is in two, alternately, and one presents by usurpation out of his turn, he is nevertheless entitled to present to the next vacancy. 3 B. & P. 444.]

[A recovery against a coparcener entitled to present for that turn, is in legal effect a grant of the turn. 1 H. B. 412.]

[The prerogative presentation to a church (the advowson of which is held by several in common) does not supply the turn of the patron otherwise entitled to present. 2 Blk. 770.]

[The right of coparceners, seised of an advowson, to present in turns, sufficiently appears from an averment, that they did not (which is equivalent to could not) agree to present. 1 H. B. 376.]

[Where the right of presentation is shewn to be in two alternately, and a presentation by one out of his turn, is pleaded generally, it must be taken to have been by usurpation, not agreement. 3 B. & P. 444.]

(H 4.) When the turn is served.

If upon a presentation the church be full, the turn shall be served, though the presentation be afterwards avoided.

As, if an incumbent be deprived, *quia mere laicus*; for the church was full till the declaratory sentence. 2 Rol. 347. l. 35. 5 Co. 102. Vide post, (M).

Or, deprived for heresy, or other crime. 2 Rol. 347. l. 30.

But if a presentation be wholly void, it shall not serve for a turn; as, if A. be presented, instituted and inducted, and afterwards does not read the 39 articles: for which the st. 13 El. 12. makes the presentation, &c. void. 2 Rol. 347. l. 50. 5 Co. 102. b.

So, if after deprivation A. be presented, &c. and then the deprivation is reversed, and the first incumbent restored: the presentation of A. shall not serve the turn. R. 2 Rol. 347. l. 40. 5 Co. 102.

If the guardian of the youngest parcener within age marries the eldest, and afterwards presents in the name of both; this shall not serve the turn of the eldest. 2 Rol. 347. l. 20.

If a dispensation be granted, upon a cession, *tenere in commendam*, and confirmed by the king; this does not serve the turn of the king. R. Sal. 541.

If A. and B. ought to present by turn, and A. usurps upon the turn of B., he shall not lose his own turn. Semb. F. g. 250.

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(H 5.) Presentation by the king as patron.

If the king be seised of an advowson, in which the church exceeds the value of 20 marks, he himself shall present. 38 Ed. 3. 3. b.

And if the chancellor presents, upon a supposition that it was under such value, and before induction the king presents, his presentee shall be admitted; or, being refused, shall have a *quare impedit*. 38 Ed. 3. 3. b.

But, after induction, such presentee of the chancellor shall not be removed. 2 Rol. 189. l. 5. Hob. 214.

[*]Except, where the presentation by the chancellor takes notice, that it was under that value, when it is not so; for then the king is deceived. 2 Rol. 189. l. 10. Hob. 214.

But to a church of the crown, under the value of 20 marks, the chancellor shall present. 38 Ed. 3. 3. b.

Or, of 20l. Hob. 214.

So, if a church belongs to an infant in ward of the king. Mo. 874. Vide post, (H 6.)

(H 6.) By his prerogative.

If the king's tenant of a manor dies, his heir within age, who is in ward to the king and during the wardship a church of the ward becomes void, the king shall present. Vide ante, (H 5.)

Though the church becomes void before seisure of the ward.

So, if it was void in the life of the tenant, and continued void at his death, the king shall present.

Though the tenant presented in his lifetime, and there was institution upon it, but he died before induction.

Though the tenant died after a lapse to the bishop, but before his collation.

Though the king does not present till the heir sues livery.

Or, the church does not become void till tender of livery by the heir, if the livery be not sued.

So, if the king grants over the ward.

So, if an archbishop or bishop dies, and during the time that the temporalities are in the hands of the king, the church becomes void, the king shall present. 2 Rol. 344. l. 21.

Or, if the church becomes void after the death of the bishop, before seisure. 2 Rol. 344. l. 26.

Or, in the life of the bishop, &c. who does not collate in his life-time. 2 Rol. 343. l. 30.

Though the king does not present, till the successor sues livery. 2 Rol. 343. l. 32.

Though by composition the presentation belongs to another, and not to the bishop; for the composition does not bind the king. 2 Rol. 343. l. 35.

Or, if the bishop collates A. in his life-time, but dies before A. is inducted. R. 11 H. 4. 9. a.

But if a bishop presents, and his clerk is inducted in the morning; though he dies in the afternoon, the king shall not present.

So, if the successor be elected before the avoidance; though he be not consecrated, the king shall not have the presentation. 2 Rol. 343. l. 15.

So, if the king be patron of a church, united by the st. 22 Car. 2. 11. to a church of which a subject is patron, and which is of greater value, (and therefore by the words of the statute shall have the first turn,) the king shall not have the first turn by his prerogative. Sho. 208.

So, if an incumbent be made a bishop, by which a church becomes void ; though a subject be patron, the king shall present. Bro. Presentment, 14. Cont. Dy. 228. b. Dub. Qw. 144. Cro. El. 527. R. acc. Mo. 391. Per two J. Hutton cont. 1 Cro. 691. 2 Rol. 342. l. 25. R. M. 6 W. & M. Ca. Parl. 185. Vau. 19, 20. 3 Lev. 377. Sho. 457. 4 Mod. 200.

[*][And the king shall have this right in a church in which several patrons have a right to present in particular turns ; and there is an act of parliament directing that they shall present in such turns. Ld. R. 23.]

[And in a rectory newly created so by statute. R. Ld. R. 23.]

So, if an archdeacon be created bishop, the king shall present to the archdeaconry : and not the patron. R. 3 Leo. 151. 4 Leo. 61.

So, if he be created a bishop in Ireland. Cro. El. 790. 1 Ver. 419. Dub. 4 Inst. 356, 7. Vide post, (N 1.)

So, if one incumbent after another be created a bishop, the king shall present *toties quoties*. R. M. 6. W. & M. B. R. 3 Lev. 378. Sho. 441. 462. 501. 4 Mod. 200.

So, if the incumbent be created a bishop, and has a *commendam retinere*, which expires in the life of the bishop ; the king shall present. R. Ca. Parl. 170. 185. 3 Lev. 378. Sho. 449. 463. 4 Mod. 200.

So, if the incumbent be created a bishop, the king shall present, though the patronage be established by act of parliament. R. Ca. Parl. 173. 185. 3 Lev. 382. Sho. 413. Sal. 540. 4 Mod. 200.

[It is not necessary that the king's presentation to a church vacant by promotion, should be in the life-time of the promotee. T. 3 Geo. 2. Str. 837.]

But the king shall not present where the incumbent of a donative is made a bishop. Ca. Parl. 184.

Nor, where a bishop elect has a *commendam retinere* for his life. Ca. Parl. 184. 2 Rol. 344. l. 5.

Nor where an incumbent of an hospital is made a bishop. 2 Rol. 343. l. 15.

Or, a provender of a provendry. 2 Rol. 343. l. 10.

So, if the king does not present upon the next avoidance, he shall not present afterwards. R. Cro. El. 790.

So, if a patron be outlawed, when an avoidance happens, the king shall present. 1 Leo. 139. 201. Mo. 270.

Yet upon reversal of the outlawry, the patron shall be restored ; and upon recovery in a *quare impedit*, he shall have a writ to the bishop. R. Mo. 270. Cro. El. 44.

So, if A. be outlawed, and a church appendant to a manor, which the king has in his possession by the outlawry, afterwards becomes void, and the king presents, &c. ; the incumbent shall not be removed, though the outlawry be reversed. R. Mo. 270.

(H 7.) How a presentation by a common person shall be made.

If a common person presents, he ought to shew how the church became void, by death, cession, resignation, or deprivation.

A presentation may be by parol, as well as by writing. Co. L. 120. a. 1 Brownl. 162.

And, if it be by writing sealed, it is not a deed ; but in nature of a letter of recommendation of the clerk to the bishop. Co. L. 120. a.

If a patron presents one, who is instituted, but dies before induction, yet the patron cannot present *de novo*. 9 Co. 132. a.

But if a patron writes and seals a presentation, and the clerk without his

privity or consent obtains it, and is instituted and inducted upon it, it shall be void. Yel. 7.

[*](H 8.) How a presentation by the king shall be made.

So, regularly, a presentation by the king ought to shew by what title he presents.

[The king's prerogative to fill the presentative benefice, of which a person he has created bishop was incumbent at the time of the creation, is not satisfied by his confirming a dispensation for a temporary *commendam retinere*, if such *commendam* expires in the life-time of the bishop. Ld. R. 23.]

[Otherwise it is. Ld. R. 26.]

And if he mistakes his title, the presentation is void; for the king was deceived; as, if he presents, *ratione lapsus*, where he was very patron. R. 6 Co. 29. b. Adm. Cro. Car. 99. 592. Vau. 14.

Otherwise, if he presents generally, without saying by what title. 1 Mod. 254.

So, the king shall present upon an avoidance in the time of his predecessor, and not the executor or administrator of the deceased king.

Though the st. 25 Ed. 3. de Clero. 1. says, he or his heirs shall not present to a benefice of the time of his progenitors, &c.; for this extends only to the progenitors of Ed. 3. as appears by the saving. 11 H. 4. 7. R. Cro. Car. 355. Jon. 338.

So, the king may present by parol. Co. L. 120. a. Mo. 874. 2 Cro. 248.

If the bishop be present. 1 Brownl. 162.

But the usual way is to make a presentation by instrument under the great seal.

Or, if it be under the privy seal, it is sufficient. Per two J. 2 Cro. 248.

So, if he presented to a church in right of a ward, under the great seal, or seal of the court of wards, it is good; for it is not material which seal. R. Cro. Car. 99. 1 Brownl. 162.

Yet, by the st. 3 H. 7. (not printed), all grants, &c. of lands, advowsons, &c. parcel of the duchy of Lancaster, are void, if they be not under the duchy seal.—And therefore, a presentation, under another seal, to a church within the duchy, is void. R. cont. Mo. 874. 2 Rol. 182. l. 15. 1 Brownl. 162. D. cont. 1 Leo. 227. Vide Patent, (C 4.)

So, a presentation under the seal of the court of wards, where the king has not the church in right of a ward, is void. R. Cro. Car. 100.

So, a presentation under the exchequer-seal, is void. 2 Cro. 248.

If the king presents a clerk, who dies before induction, he shall present *de novo*; for his presentation ought to have complete effect. R. 9 Co. 132. a.

(H 9.) Within what time a presentation shall be made.

Every common person ought to present within six months after the avoidance, if the church becomes void by the death of the incumbent; otherwise, the presentation lapses to the bishop. 3 Leo. 46. 2 Rol. 363. l. 25.

Though the patron presents, and his clerk is refused for inability. R. Dy. 327. b. R. 4 Mod. 140. Ca. Parl. 103. Bend. pl. 136. 3 Leo. 46. 2 Rol. 364. l. 20. Vide post, (H 11, &c.—N 1, 2.)

[*]So, if a church becomes void by statute; as, by acceptance of a plurality; for the patron ought to take notice at his peril. R. Dy. 237. a. 2 Inst. 632. R. Cro. Car. 357. Jon. 338.

By certificate of the bishop for non-payment of tenths according to the st. 26 H. 8. 3. R. Dal. 59.

So, if a church becomes void by cession. Jon. 337.

And the six months shall be reckoned by the calendar, viz. 182 days. Dy. 327. b. in marg. Vide Ann, (B).

But, if an avoidance be by resignation, or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron. Dy. 327. b. Dal. 51. 59. R. Bend. pl. 234. Dy. 293. 3 Leo. 46. Vide post, (N 11.)

Though the patron was party to the suit, in which he was deprived. R. 6 Co. 29.

Though notice be given by other than the ordinary ; for the ordinary himself ought to give express notice, that he was deprived for such a cause, and that thereby the church became void, and it belongs to him to present. R. 6 Co. 29. b.

Though the bishop dies, the lapse does not incur to his successor before notice. 2 Rol. 365. l. 20.

Though the temporalities are in the king's hands : for the guardian of the spiritualities ought to give notice. 2 Rol. 365. l. 26.

So, by the st. 13 El. 12. if the presentee does not read the 39 articles, by which the church is *ipso facto* void, without a declaratory sentence ; yet it is provided that no lapse commence till notice. R. 6 Co. 29. b. Dy. 369. b.

(H 10.) When it may be revoked.

If the king makes a presentation, he may afterwards revoke it, and present another. Adm. 38 Ed. 3. 3. 2 Roi. 188. l. 40.

And this, at any time before induction, though the clerk be instituted, and a letter sent to the archdeacon to induct him. Bro. Qu. Imp. 1. 10. 65.

If the king revokes a former, and makes a second presentation : the former is void, without notice to the ordinary. Dy. 327. 2 Rol. 188. l. 52.

So, a lay-patron, before institution, may vary his presentation, and present another ; upon which the bishop may admit the one or the other. Latch, 191. 253.

Or, may revoke the former presentation before admission. Per Dod. Latch, 192. 254. 2 Rol. 349. l. 7.

So, a patroness, though a spiritual person, as an abbess, might vary her presentation ; for she is not more apprised than a lay-patron of the sufficiency of her clerk. Kel. 154. a.

But if the king makes a second presentation, without mention or revocation of the former, it shall be void. Semb. Cro. Car. 100. 2 Rol. 188. l. 40. Dy. 339. b.

But R. cont. for the first presentee had not any estate or interest in the church. 2 Rol. 190. l. 30.

If the second presentation, without mention of the former, be after institution upon the former, it shall be void. R. Dy. 339. b. in marg. Per three J. 2 Cro. 248.

[*]So, if the second presentation be obtained by covin, or by deceit to the king. R. Dy. 339. b. Bend. pl. 279.

Otherwise, if the second presentation be obtained without covin, and before admission and institution upon the former. R. Dy. 339. b. in marg.

So, a spiritual patron cannot revoke or vary his presentation ; for he

shall be intended conusant of the sufficiency of his former clerk. R. Kel. 154. a. Acc. per two J. Whitl. cont. Latch, 191. 253.

[A lay-patron may revoke his presentation. 2 Blk. 1039, *et supra*.]

(H 11.) Presentation by lapse.—To the bishop and archbishop.

If a patron does not present within six months after avoidance, (where he ought to take notice of it, or after notice, when the ordinary ought to give notice), the church lapses to the bishop, and he shall present by lapse. 2 Inst. 273. Vide ante, (H 9.)

And this seems to be by a canon in the council of Lateran. 2 Rol. 362. O.

[Lapse shall incur from the time of institution into a second benefice, against the patron, if notice be given him; otherwise, not. Semb. 2 Wils. 174.]

[Lapse shall incur from the time of induction, without notice. Ibid.]

[Lapse only incurs from the induction to second benefice. 3 B. M. 1504.]

If the bishop does not present within six months after the lapse to him, then the church lapses to the archbishop.

And a lapse incurs, though the patron be an infant. 3 Leo. 46.

Or, out of the realm. Wat. 1.

So, a lapse incurs if no clerk was presented, though the patron brings a *quare impedit* against the bishop and others. Per Hob. 200.

Though the patron recovers in a *quare impedit*, if the bishop be not a party, and no writ comes to the bishop within six months. 2 Rol. 366. l. 5.

But the bishop, or the king, cannot grant the benefit of the lapse to another. 2 Rol. 187. l. 32. Hob. 154.

If a bishop dies after a lapse incurred, his executor or administrator shall not present, but the king: for it is a trust, and not an interest. Hob. 154.

(H 12.) To the king.

So, if the bishop does not present, nor the archbishop within six months after a lapse to him, the church lapses to the king.

And upon a lapse to the king, he is not confined to any time; for the st. 25 Ed. 3. 1. does not extend to presentations to be thereafter made. R. Cro. Car. 355. Jon. 337.

So, the king's successor may present upon a lapse to his predecessor. R. Cro. Car. 355. Jon. 337. 11 H. 4. 7.

So, if a bishop does not collate to a dignity, prebend, &c. a lapse incurs to the king.

So, if he does not collate, where the avoidance is by acceptance of another benefice, and the former is in his own diocese, a lapse incurs before deprivation.

[*](H 13.) When there shall be no benefit of a lapse.

But if a *quare impedit* be brought against a bishop, upon refusal of a clerk, though six months pass *pendente lite*, there shall be no lapse to the bishop. Co. L. 344. b.

So, in every case, where a *quare impedit* is brought within six months, no lapse incurs to the bishop, if he be made a party to the writ. Co. L. 344. b. R. 6 Co. 52. a. 2 Cro. 93. Hob. 320.

Nor, in such case, shall there be a lapse to the archbishop, or the king; for where there is not a lapse to the bishop, it shall never be to the archbishop, or the king. Co. L. 344. b. 345. a. R. 6 Co. 52. a. 2 Cro. 93. 2 Rol. 365. l. 21.

So, no lapse ineurs, where the king is patron, though he does not present within six months, or afterwards. 2 Inst. 273.

So, after a lapse, if the patron presents before the bishop or archbishop collates, his clerk shall be instituted. R. Hutt. 24. Hob. 152. 4. 2 Inst. 273.

So, after a lapse to the king, if the patron presents before the king takes advantage, and his clerk is admitted, instituted, and inducted, and dies incumbent, the king shall not present by lapse; for lapse is only *unica et proxima vice*. R. Ow. 2. Mod. 224. 269. Cro. El. 44. Adm. Ow. 5. Mo. 259. Cro. El. 119. R. 7 Co. 28. Adm. 2 Cro. 216. Lut. 1086. Qu. Dy. 277. a.

So, if a clerk presented by a patron after a lapse to the king resigns, without covin. 2 Cro. 216.

But after a lapse to the king, though the patron presents before the king takes advantage, and his clerk is instituted and inducted, the king may present *quamdiu* the presentee of the patron continues incumbent. R. 2 Cro. 216. Dub. Hob. 154.

Though such presentee afterwards resigns, by covin. 2 Cro. 216. 1 Brownl. 161.

So, if he be deprived. Adm. Ow. 5. Mo. 259. Cro. El. 119.

So, if he does any act by which the church becomes void; as, for not paying his tenths. R. Ow. 5. Mo. 259. Cro. El. 119.

So, if the bishop, after a lapse to him, collates, and the patron presents before induction, the bishop may refuse his clerk. Dy. 277. a.

(H 14.) Presentation by usurpation.—What shall be.

If a man presents to a church without title, this usurpation makes as it were a disseisin, which puts the rightful patron out of possession, and, by the common law, gains the advowson to the usurper for ever, if it be not recovered by right of advowson. Co. L. 344. b. R. 6 Co. 49.

And, after usurpation, the rightful patron cannot grant the advowson to another, till recovery.

And, by the common law, an usurpation upon an infant, feme-covert, &c. puts them to their right of advowson. R. 6 Co. 49.

So, the king may make usurpation by his presentation; for the induction creates the wrong. Per three J. Windh. cont. 1 Sid. 163.

So, collation without title puts him, who has a right to collate, out of possession. 6 Co. 30. a. Co. L. 344. b. 6 Co. 50. a.

So, the king shall be put out of possession of the next avoidance, by an usurpation upon him. 1 And. 81. Vide post, (H 15.)

[*](H 15.) What not.

But if a presentation be void, though the clerk be instituted and inducted upon it, it is not an usurpation, nor shall the rightful patron be thereby out of possession, nor need he have a *quare impedit* to remove such incumbent; as, if the king presents upon a mistaken title. R. 6 Co. 29. b. Vau. 14. Vide post, (M).

Or, if institution and induction be upon a presentation by the king, which was revoked. 6 Co. 29. b.

Or, the bishop collates before six months elapse. R. 6 Co. 29. b.; for the church is not full without a presentation, or lawful collation. Co. L. 344. b. Hob. 316.

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So, no collation without title puts him who has a right to present out of possession. 6 Co. 30. a. 50. a. Per two J. Dal. 59.

So, a collation by title does not put him who has a right to present out of possession. R. 1 Leo. 226. Cro. El. 240.

So, a recovery in a *quare impedit* against a clerk, whom the king presented by usurpation, avoids the usurpation. R. 1 Mod. 255.

So, since the st. 1 El., an usurpation upon a bishop, or other ecclesiastical person, though it puts him out of possession, does not bind his successor, who shall have a *quare impedit*, or present, as if no usurpation had been made. R. Jon. 46.

So, usurpation upon an infant does not bar him, but he may continue by presentation or *quare impedit*. Jon. 46.

So, by usurpation upon the king, he shall not be put out of the inheritance of an advowson. 6 Co. 49. b. Co. L. 344. b. R. 1 Brownl. 166. R. Dal. 75. R. 1 And. 81. Per two J. Cro. El. 519. Vide ante, (H 4.)

Yet he shall lose the presentation *hac vice*, if he does not recover it by *quare impedit*. 6 Co. 49. b. 2 Cro. 54. 123.

And if he confirms the estate of the presentee, it shall be good. 1 Brownl. 166.

So, by twenty usurpations upon the king, he shall not be put out of possession of the advowson, but shall maintain a *quare impedit* upon the next avoidance. R. and judgment cont. reversed. 2 Cro. 53. 123. 2 Rol. 371. l. 45. R. Cro. El. 240. 1 Leo. 226. R. cont. Godb. 7.

Though the king be seised in right of the duchy of Lancaster. R. Cro. El. 240. 1 Leo. 226.

So, after an usurpation, a patron may recover, by right of advowson by the common law, though he loses the present presentation for ever. Co. L. 344. b.

So, by the st. W. 2. 5. may those entitled in reversion after the death of a tenant in dower, by the curtesy, for life, or for years, or in tail, or an heir of full age, who has been in ward, where the usurpation was during the particular estate, or during the wardship.

So, by the same statute, women discover, where the usurpation was during their coverture.

Ecclesiastical persons, where it was during the vacancy.

But till recovery he continues out of possession, and a grant of the advowson by him is void. Jon. 46.

So, till recovery, or presentation by an infant, or the successor of a bishop. Jon. 46.

So, by the st. 7 Ann. 18. no usurpation, &c. shall displace the estate [*] or interest of any entitled to an advowson, or turn it to a right; but such person so entitled may present or have a *quare impedit* on the next or any subsequent avoidance, as if no usurpation had been.

[(H 15. a.) Other matters.]

[A grant of the next presentation to a benefice, means the next which the grantor will by law be entitled to; if, therefore, the present incumbent is made a bishop, whereby the king becomes entitled to the presentation, a covenant for title in the grant is not broken, and the grantee may present on the next vacancy. 2 H. B. 324. 6 T. R. 439. 778.]

[Where the right of nomination is in A., and that of presentation in B., and B. has a discretion to reject or approve of the nominee, he is the sole
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judge of the sufficiency of his acquirements; but, if he reject the nominee for improper conduct, the nominee may appeal to a jury. 3 T. R. 646.]

(I) ADMISSION AND INSTITUTION; HOW MADE, &c.

When a patron presents his clerk to the ordinary, he, upon examination, if he finds him qualified, ought to admit him; and thereupon he says, *admitto te habilem*. Co. L. 344. a.

And afterwards, *instituo te rectorem talis ecclesiæ, accipe curam tuam et meam*. Co. L. 344. a.

But admission and institution are taken the one for the other. Co. L. 344. a.

The institution by the ordinary was introduced *circa tempus* R. 1. and John; before which the incumbent took his church by investiture of the patron. Seld. de Dec. 86. 375. 383.

The ordinary ought to make institution in a convenient time after the presentation tendered to him.

By the canon, 1 Jac. 95. the space of two months, which by former constitutions bishops had to inquire of the sufficiencies and qualities of ministers presented, is reduced to twenty-eight days. And within the twenty-eight days the bishop shall not institute any other to the prejudice of the party before presented, *sub pœna nullitatis*.

Institution may be made by the bishop out of his diocese; and by any seal. R. Jon. 331.

And though made after caveat, without hearing of the party, it shall not be void. R. 1 Rol. 227.

If a patron presents after a lapse to the archbishop, and before collation by him, he may present to the bishop. 2 Rol. 348. l. 50.

After institution, the bishop sends letters to the archdeacon to make induction. Vide post, (L).

But the ordinary may refuse a clerk presented to him, if he be *minus idoneus*; as, if he be a villein, a bastard, outlawed, excommunicated, or within age. 2 Inst. 632.

Or, *mere laicus*. 2 Inst. 632. 5 Co. 58. a.

So, if he be *criminosus*; as a heretic, or schismatic, &c. 2 Inst. 632. R. Dal. 51.

Or, a manslayer, felon, &c. 5 Co. 58.

Or, guilty of any offence, for which he ought to be deprived. R. 5 Co. 58. a.

So, if he be illiterate. 2 Inst. 362. Ca. Parl. 91.

Though he was before admitted to orders, and a benefice. Ca. Parl. 90. Sal. 539.

[*]So, if the benefice be in Wales, and the clerk does not understand Welsh. R. Cro. El. 119. 1 Leo. 31.

So, if he be not in orders, and gives no reasonable proof that he is. 1 Leo. 230.

If he be an alien. 3 Inst. 338.

The examination of a clerk belongs to the ordinary as a judge, and not as a minister. 2 Inst. 632.

After refusal, the ordinary ought to give notice of it to the patron, if he be refused for any cause which belongs to the consance of the ecclesiastical law: as, for heresy, schism, illiterature, &c. 2 Inst. 632. 4 Mod. 140. Sal. 539.

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And the notice ought to be personal by letters from the bishop to the patron; for notice fixed to the door of the same church is not sufficient. Dy. 327. b. Cro. El. 119. Vide infra. Vide post, (N 11.)

Though he had personal notice before of the refusal of a former presentee, and the patron still continues in the same county. Dy. 328. a.

So, notice ought to be given in a convenient time. R. 4 Mod. 140. Ca. Parl. 103. Sal. 539. R. 1 Leo. 32. Cro. El. 119.

But there needs no notice to the patron, where he is refused for a temporal crime; as manslaughter, &c. 2 Inst. 632. 3 Leo. 47. Adm. Sal. 539.

Or, for a disability incurred by act of parliament, if the act does not oblige notice to be given. 2 Inst. 632.

So, notice upon the door of the church is sufficient, where the patron is out of the county. Cro. El. 119. 1 Leo. 32. Vide supra.

Yet the cause of refusal is traversable; and if it be a spiritual matter, and the clerk is living, it shall be tried by the metropolitan. 2 Inst. 632. 5 Co. 58. a.

If the cause of refusal be a temporal matter, or a spiritual matter when the party is dead, it shall be tried by the country. 5 Co. 58. a. 2 Inst. 632.

And therefore, if a patron brings a *quare impedit* against the bishop upon refusal of his clerk, the plea of the bishop ought to shew a certain and particular cause of refusal; for it is not sufficient to say, generally, *quod non fuit idoneus*, or *quod fuit criminosus*, &c. R. 5 Co. 58.

Or, that he was a haunter of taverns, *ob quod et alia crimina*, &c. 5 Co. 58. a. Mar. pl. 11.

That he was a schismatic, without shewing how. R. 5 Co. 58. 3 Leo. 200.

But *quod fuit minus sufficiens in literatura, et ea ratione inhabilis* is sufficient; for it is in the negative, and does not consist of a single instance, but general ignorance. R. cont. in C. B. and aff. in B. R. but afterwards reversed in parliament. 4 Mod. 135. Ca. Parl. 92. 3 Lev. 314. Sal. 539.

So, it shall not be a cause for refusal, that he does not produce his letters of orders; for perhaps they are lost. 1 Leo. 230. Cro. El. 241, 2,

That he had not any letters testimonial. 1 Leo. 230.

(K) JURE PATRONATUS.

(K 1.) How it shall be awarded.

So, if two present to the bishop, he may have a *jure patronatus* before he institutes the clerk of either of them; and upon that a commission [*] goes under the bishop's seal, to his chancellor and others, who make a mandate to an officer to summon twelve or more, one moiety clerks, the other laymen.

The jury ought to inquire, 1. Whether the church be void, and how; 2. Who presented last; 3. Who is the rightful patron; 4. Who ought now to present; 5. Whether the clerk be *idoneus*.

(K 2.) When necessary.

A *jure patronatus* may be awarded whenever a church is litigious: as, if two patrons present several persons to the same church. Hob. 317.

Or, the same person; for the admittance of the clerk of one puts the other out of possession.

So, if the bishop suspects the title of the patron, he may award a *jure patronatus*, though the church be not litigious. Hob. 318.

As, where lapse does not incur before notice, to ascertain the very patron. Hob. 318.

So, if there be a verdict in a *jure patronatus* for the one patron, and afterwards he presents his clerk; and before his admittance, the other presents; the bishop may award a new *jure patronatus*.

So, if either party requires a *jure patronatus*, the bishop ought to award it; otherwise he will be a disturber.

(K 3.) When not.

But the bishop need not award a *jure patronatus*, except at the prayer and costs of one or both parties. R. 2 Leo. 168.

So, he may admit at his peril the clerk of either patron, though the church be litigious, without a *jure patronatus*; but he will be a disturber thereby, if the patron of the clerk admitted does not appear to have title. 2 Leo. 168. 1 Rol. 227.

If he admits the clerk of one patron without a *jure patronatus* before the other presents, he shall not be a disturber; though the first patron afterwards does not appear to have title.

So, if a *jure patronatus* be granted, he may admit the clerk of the one *pendente lite*, upon peril that he be a disturber, if he has not the right. R. 2 Leo. 168.

And if a suit be in the spiritual court for such admission *pendente lite*, a prohibition goes. R. 2 Leo. 168.

The verdict in a *jure patronatus* does not bind the right of the patron; for it is only an inquest of office. Hob. 317.

So, it does not bind the bishop; for he may admit the clerk of the other patron contrary to the verdict in a *jure patronatus*, if he will. Hob. 317.

But it will be at his peril; for he will be a disturber, if the patron of the clerk admitted has no title. Hob. 317.

And the patron, for whom the verdict was in the *jure patronatus*, shall have an action upon the case for his damage and expence in suing a *quare impedit*, if he does not make the bishop a party to the suit. Hob. 318.

But a verdict in a *jure patronatus* binds all; that the bishop shall not be a disturber, if he admits the clerk, for whom the verdict is found, though the other patron afterwards recovers. Hob. 317.

[*](L) INDUCTION, BY WHOM IT SHALL BE MADE.

After institution the bishop makes a mandate to the archdeacon to make induction; before which the clerk is not complete incumbent.

Or, the bishop may give his mandate to other than the archdeacon, if he pleases.

Or, by prescription or composition, another may claim a right to make induction. 11 H. 4. 9.

The archdeacon need not make induction in person, but may give authority to another clerk within his jurisdiction to make it.

Or, he may direct his precept *omnibus et singulis rector. vicar. cleric. et literat. infra archidiaconat. meum, &c.*

So, if it be by a clerk out of his archdeaconry, it will be good.

If the bishop dies after a mandate to the archdeacon and before induction yet he may afterward induct. R. cont. but the judgment afterward reversed. 1 Vent. 309. 319. 2 Jon. 78.

But if the guardian of the spiritualties institutes, and makes a mandate for [*623]

induction, and before induction made, a new bishop is consecrated, the mandate becomes void. R. 2 Lev. 199.

If the archdeacon refuses induction, he may be sued in the spiritual court.

Or, an action upon the case lies against him. 1 Vent. 309. F. N. B. 47. H.

And the bishop cannot revoke his mandate. 1 Vent. 309.

So, a prohibition of the execution of the mandate cannot be made by the king. 1 Vent. 309.

Before induction the clerk has not seisin of the possessions of the church. 2 Inst. 358.

Nor, can he grant.

Or, sue for tithes.

(M) WHEN A CHURCH SHALL BE FULL.

A church is full, as against a common person, by admission and institution, before induction : and therefore, after institution, the rightful patron cannot present ; but ought to have his *quare impedit*. 2 Rol. 349. l. 25. 2 Inst. 358.

And therefore, in a *quare impedit* by the king, or him who makes title by the king, it is sufficient to allege a presentation, upon which the clerk was admitted, and instituted, without saying, inducted. R. Bend. pl. 297. Vide Pleader, (3 I 5.)

And if A. be presented, and instituted, and afterwards B. is presented, instituted, and inducted, it shall be void. 3 Sal. 195.

So, by admission, institution, and induction, the church is full against the king ; for he cannot present another, though he has right ; but ought to have his *quare impedit*. 2 Rol. 349. l. 45. 2 Inst. 358.

[But the church is not full against the king until induction. 1 F. 127.]

[Though he himself presented. 1 F. 127.]

So, he cannot present the same clerk, who is presented by usurpation ; for it does not amount to a surrender and new presentation. 2 Rol. 349. l. 51.

[*]So, he cannot present a clerk before presented, *ad corroborandum*, but ought to make an express grant. 1 Sal. 162.

By admission, institution, and induction, a church shall be full, though the presentee was *mere laicus*. R. Dy. 293.

But if a bishop collates within six months, or before notice to the patron, where notice is necessary, &c. though a lapse to the metropolitan be thereby prevented, the church is not full by such unlawful collation : but the patron may present without a *quare impedit*. Vide ante, (H 15.)

So, if the king presents *ratione lapsus*, &c. where he mistakes his title, though there be institution and induction upon it : for the king is deceived, and the presentation being void, institution upon it is in the nature of a collation. R. 6 Co. 29. b. R. Hob. 302.

Yet, as to all but the rightful patron, he is incumbent : for he shall sue for tithes, may take a confirmation from the king, &c. Hob. 302.

(N) WHEN A CHURCH BECOMES VOID,

(N 1.) By death, or cession.

A church becomes void by the death of the incumbent, which is the act of God ; or, by cession or resignation, which are the acts of the party ; or, by act of law, as simony, non-residence, deprivation, &c.

If an incumbent dies, his benefice becomes void, and the patron without notice ought to present within six months. Vide ante, (H 9, 11, &c.)

So, if the incumbent makes a cession ; as, if he be created a bishop, all his ecclesiastical benefices become void, without a dispensation *retinere in commendam*. 11 H. 4. 7. 37. 60. Vide ante, (H 6.)

Though it be a benefice in another diocese.

Or, another kingdom under the dominion of the king.

Though it be a benefice *sine cura*, as well as *cum cura animarum*.

If he be made a bishop of Ireland. Pal. 345. 349. Vide ante, (H 6.)

If he be created bishop of the Isle of Man. Pal. 345.

If a bishop were made a cardinal. 4 Inst. 357.

And it shall be void without a declaratory sentence. Jon. 337.

But a benefice is not void by acceptance of a bishopric, till consecration.

Nor, if he be only a tutelar bishop.

Or, a suffragan bishop.

Or, a bishop in Italy, or other foreign kingdom. Pal. 349.

(N 2.) By resignation.

So, if an incumbent resigns his church, by proper words, to his ordinary, who accepts it, the church is void.

So, two by the same writing, may agree to exchange their churches, and with such intent to resign them to the ordinary ; and if such exchange be completed in the life of the parties, it shall be good.

And such resignation ought to be by proper words ; as, *renuncio, cedo, dimitto*, &c.

So, if a man gives, grants, renders, and confirms to the ordinary a prebend, it shall be good.

If a man makes a resignation of a church to the bishop of the diocese, it shall be good, generally.

[*]Or, of a donative to the patron.

Or, to the patron and a stranger ; for as to the stranger it is void.

If he makes a resignation of a deanery, prebend, &c. of the king's donation, to the king, it shall be good.

A resignation to him, who is not the proper ordinary nor can make institution, is void.

So, a resignation shall be void, if it be upon condition to present such an one : for it ought to be made *sponte, pure, et simpliciter*.

So, a resignation till acceptance by the bishop is not valid, and a presentation by the king before is void. R. 2 Cro, 197.

(N 3.) By simony.

So, the st. 31 El. 6. if any for reward, promise, &c. directly or indirectly present, collate, &c. to any benefice or ecclesiastical promotion, such presentation and the admission, &c. thereon shall be void, and the queen shall present for that one turn only ; and any person who shall give or take any such money, promise, &c. shall forfeit two years profits of such benefice ; and any person corruptly taking such benefice shall be disabled for ever to have the same benefice.

And if any, for money, (other than lawful fees,) promise, &c. directly or indirectly institute, induct, &c. any to any benefice, &c. he shall forfeit two years profits, and the benefice shall be void, and the patron present, &c.

Simony is *voluntas emendi, vel vendendi spiritualia, aut spiritualibus annexa*. Cro. El. 789.

As, if a bishop takes above the fees allowed, for granting orders, institution, &c. R. Carth, 485.

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By the canon law, it was a cause for deprivation.

And a church shall be void by the st. 31 Ed. 6. if the clerk makes a gift, promise, &c. of any benefit to the patron ; as, if he agrees to make a lease to the patron of his tithes, for such a rent.

If he agrees with the patron for so much for the next avoidance, when the incumbent is sick. Cont. per three J. and acc. Cro. El. 686. Mo. 916. R. acc. Win. 63.

If he agrees for 90l. with the patron to present him when the church becomes void, and for security takes a grant of the next avoidance to B. in trust. R. 1 Brownl. 164.

If after an avoidance and *quare impedit*, by a mortgagee upon the presentation of a stranger, the heir of the mortgagor has a decree in equity for redemption, and that he shall recover the presentation in the name of the mortgagee, and then he articles for sale of the advowson to A., and that he shall present such person as A. shall name, who names B., and this was with intent that B. should be presented ; it is simony. R. 3 Lev. 116.

So, if A. agrees for money to resign, or to make another his curate. R. Carth. 485.

So, if the father or friend of a clerk makes a simoniacal contract with the patron, or with his wife, or friend, without his privity ; though the clerk is not privy to the contract, the church shall be void. 1 Brownl. 165. R. 3 Lev. 337. Lut. 1090. 1093.

Or, makes a promise without the privity of the clerk, that he shall make a lease of his tithes to the patron which the clerk afterwards does.

[*]So, if a man presents by usurpation, upon a simoniacal contract. 3 Inst. 153.

So, by the st. 12 Ann. 12. if any, after 29th September 1714, for money, promise, &c. directly or indirectly take, procure, or accept the next avoidance in his own or another's name, and be presented or collated thereon, the presentation, &c. shall be void and the contract simoniacal, and the queen present or collate from that turn.

If a church be void every one may take advantage of it : as, a parishioner in a suit against him for tithes. [Hob. 168. 5 T. R. 5.]

If the patron be privy to the simoniacal contract, he shall lose the profits of the benefice for two years, and the king shall have the presentation *pro hac vice*.

And the computation of the profits shall be according to the real value ; not according to the valuation 26 H. 8. 3 Inst. 154.

So, though the patron be not privy to it, the king shall have the presentation. Semb. Lut. 1087.

And the church continues void, though the simony be pardoned by parliament. R. Cro. El. 686.

And the king shall present, though the incumbent, presented by simony, dies ; for *nullum tempus occurrit regi*. R. 1 Brownl. 164.

So, if a clerk, presented by simony, be privy to the contract, he shall be disabled to be presented by the king or otherwise, for ever. (Vide 3 Inst. 153, 4.)

[A person privy to a simoniacal contract is only disabled from being presented to that benefice, which was the object of the contract ; but this disability extends no farther, and he still remains eligible to any other benefice. 1 Rol. Rep. 237. 3 Bulst. 91. Hob. 75. Cro. Jac. 386.]

[Absolute disability is the punishment of simony by the canon law. 3 Burn's E. L. 347.]

And the king cannot dispense with such disability. 3 Inst. 154.

But where the clerk was not privy, though the church be void, he shall not be disabled to be afterwards presented. 3 Inst. 154.

So, if A. presents upon simony by usurpation; the king shall not have the presentation, but the rightful patron. 3 Inst. 153.

So, if a person presented by the king to a church, contracts with B., presented by another patron, that he will not pursue his presentation; it is not a simoniacal contract. Dub. 2 Rol. 464.

So, it will not be a simoniacal contract, if a father contracts for the next avoidance for his son, without his privity. R. Mo. 916.

If one gives a bond to resign upon request. R. Ray. 175. 1 Sid. 387. R. 2 Cro. 248. 274. R. Cro. Car. 180. Hut. 111. Jon. 220. [B. R. M. 23 G. 3. 1 East, 487. Cun. Law of Sim. p. 52. contra.]

[A general bond by the clerk of a benefice to resign, at the patron's request, is illegal. 1 East, 487.]

[A bond conditioned to resign a benefice on request is void, if given to invest the obligee with an undue influence over the clerk; but in plea avoidance of the bond on that ground must state in what the undue influence consisted, that a specific issue may be taken. 1 East, 487.]

[The inhabitants of P. having by endowment and an ancient deed, the right of appointing a curate, who is entitled, besides a salary, to the receipt of vicarial tithes, an inclosure act is passed, reciting that it is matter of doubt whether the curate is entitled to small tithes or to a modus in lieu thereof, which question is left unsettled by the act; the [*]inhabitants, four years afterwards, present a curate, with whom they enter into an agreement, signed by him and the inhabitants, stating his appointment, that he is entitled to the "payment of 40*l.* 8*s.* 2*d.* annually, payable out of the lands and hereditaments at P., in right of the said curacy, together with surplice fees, and all other profits, privileges, and appurtenances to the same belonging, and of right payable." The inhabitants considering that sum not sufficient, voluntarily agreed to pay a farther annual sum of 29*l.* 11*s.* 10*d.*, with a proviso, that it should not in any respect alter the money payment of 40*l.* 8*s.* 2*d.* wherewith the said funds are and have been immemorially charged in right of the said church. Held, that this agreement gives a benefit to the inhabitants who make the presentation, inasmuch as it bars the right of the curate to his tithes, and affords evidence in future of a modus, and is therefore simoniacal and void under 31 Eliz. c. 6. s. 5. 3 Smith, 570. 7 East, 600.]

[A bond given by an incumbent to the patron to resign, on neglecting the duties which, as incumbent, he is bound to perform, is valid. 4 T. R. 78.]

[Semble, that a bond to resign in favour of a particular person is not simoniacal, it not being open to the same objection as a general resignation bond, which makes the incumbent a mere tenant at will. 4 M. & S. 66.]

[Quære, whether a bond given on presentation to reside upon the benefice, kept it in repair, and resign in favour of the patron's son, is void. 4 T. R. 359.]

[A., the incumbent of a living and owner of the advowson, agrees with B. for the sale of the advowson, and for the immediate resignation of the living; and accordingly tenders his resignation to the bishop, who refuses to accept it. Another agreement is then entered into between the same parties for the sale of the advowson only, without any contract for the resignation, and at the same time, by a separate agreement, A. grants a lease of the tithes

and profits to B. for ninety-nine years, if A. should so long live ; under which lease B. receives the profits till A.'s death. On A.'s death, the crown presents for that term only, by reason of simony. The incumbent presented by the crown dies, whereupon B. claims the right to present. It is objected by A.'s heir, that the second contract for the sale of the advowson, and the lease of the tithes of the same date, being for the purpose of carrying the former simoniacal contract into effect, was also simoniacal and void. Held, that whether the second agreement were simoniacal or not, the illegality, if any, extended to the next presentation only ; and that therefore the crown having presented for one turn, B. had a good title to the advowson, and had a right to present on the present vacancy. 1 Mars. 292. 5 Taunt. 727.]

[The court will not let the validity of a bond of resignation be argued ; they (even general ones) have been so often established, and even in a court of equity. M. G. Str. 227.]

Yet if a wrong use be made of such bond, it may be averred to be made for such purpose, and then it will be void. R. Mo. 641. Acc. Cro. Car. 180.

So, chancery will stay a suit upon it, if a corrupt use be made of it. 1 Ver. 411. 2.

[In an action for use and occupation of the glebe lands, the defendant [*] cannot give evidence of a simoniacal presentation of the plaintiff, for the purpose of impeaching his title. B. R. M. 33 G. 3. 5 T. R. 4.]

(N 4.) By non-residence.

By the common law, every one who had *curam animarum* was bound to perpetual residence. St. Eccl. Cases, 27.

By can. Step. arch. in concilio Oxon. *episcopi in ecclesiis cathedral residere procurent in majoribus festis, &c.* Lind. 131.

By another can. ibid. *episcopus nullum ad vicariam admittat nisi velit personaliter ministrare, et si non sit ultra 5 marcas, nisi resideat, &c.*

Et residere debet cum effectu, viz. continue in beneficio morari. Lind. 131.

By can. Othon. 1236. *ad vicariam nullus admittatur, nisi juret residentiam facere, et eam faciat continue.* Const. Oth. 26, 27.

So, non-residence has been often condemned in parliament.

And now, by the st. 21 H. 8. 13. all spiritual persons, promoted to any archdeaconry, deanery, or other dignity in a cathedral, or other church, or beneficed with any parsonage or vicarage, shall be personally resident on such dignity or benefice ; and if he absent himself wilfully one month together, or two months at several times in one year, and keep not residence at one of his dignities, prebends, or benefices, he shall forfeit 10*l.*, a moiety to the king, a moiety to him that will sue, &c. [Vide st. 43 G. 3. c. 84. & 109.]

So, he ought to reside at the parsonage-house ; for if he lets it, though he dwells in another house in the same parish, it will be within the statute. R. 6 Co. 21. b. Mo. 540. Cro. El. 590. Semb. 2 Brownl. 54.

Though he occupies the parsonage by a servant and does not let it, but dwells in another house. Semb. 2 Brownl. 54.

By the st. 13 El. 20. no lease, &c. shall be good longer than the lessor is resident, without absence above eighty days in one year. Vide Estates, (G 4.)

So, if a man has a vicarage in a cathedral, and another benefice with cure ; it is not sufficient that he be resident upon his vicarage, for that is only nom-

inal: and where a person has two benefices, one only nominal, he ought to reside upon the real benefice. R. 27 H. 8. 10. b.

An information, or debt by *qui tam*, &c. lies upon the statute for non-residence. Vide Pleader, (2 S 23.)

[Information on 21 H. 8. c. 13. lies not at the assises. R. on Demurrer. M. 12 G. 2. Str. 1103. Andr. 291.]

But the st. 21 H. 8. 13. as to non-residence, does not extend to any spiritual person in the king's service beyond sea, or in pilgrimage, going or returning, nor to a scholar abiding for study at any university within the realm or without, nor to a chaplain of the king, queen, or any of their children, brethren or sisters, during attendance in their households, nor to any chaplain of any archbishop, bishop, lord spiritual or temporal, duchess, &c. lord chancellor, treasurer, chamberlain, or steward of the household, treasurer, or comptroller of the household, knight of the garter, chief justice of the king's bench, warden of the ports, master of the rolls, king's secretary, dean of the chapel, or almoner, during attendance without fraud, in their houses.

Nor to the master of the rolls, dean of the arches, chancellor, or commissary of any archbishop or bishop, masters in chancery, advocates [*] in the arches during their offices, nor to a spiritual person bound to daily appearance by injunction of chancery, or the king's counsel, to answer the law; and the king may give licence of non-residence to any of his own chaplains.

Nor, by the st. 25 H. 8. 16. to the chaplain of any judge, chancellor, or chief baron of the exchequer, attorney or solicitor general, attending in his house, or on his person.

Nor, by the st. 33 H. 8. 28. to the chaplain of the chancellor of Lancaster, chancellor of the augmentations, groom of the stole, &c.

So, the st. 21 H. 8. 13. does not extend to a spiritual person not wilfully absent: as, if there be no house upon the rectory. 6 Co. 21. b.

[The want of a parsonage house is no excuse for the incumbent's residing out of the parish. Cowp. 429.]

[A sequestration upon a *sci. fa.* of a benefice with cure, is no excuse for the non-residence of the incumbent. Cowp. 129. Lofft. 602.]

And therefore, an information is bad, if it says *absentavit*, omitting *voluntarie*. R. Cro. El. 100.

If he be imprisoned without covin. 6 Co. 21. b.

If he be removed by advice of physicians, without fraud, for recovery of his health. R. 6 Co. 21. b. R. 2 Bul. 18.

So, the statute does not extend to an archbishop or bishop.

So, the statute does not extend to him, who resides upon the one or the other of his benefices or dignities, if he has a dispensation.

[The incumbent of two livings, one of which has a house of residence upon it, and the other not, may reside on that in which there is no parsonage house, without a licence from the bishop, and such residence will excuse him from residing on the other living. 1 Marsh. 547. 6 Taunt. 198.]

[The incumbent of two livings, A. and B., obtains a licence from his bishop to reside out of the parish of A., there being no parsonage-house therein, on condition of his residing, at a short distance, and actually performing the duties. Held, that this is not such a residence at A. as to excuse him from residing at B. without another licence for that purpose. 1 Mars. 368. 6 Taunt. 52.]

[A rectory in one diocese, annexed to a deanery in another, requires a distinct licence of non-residence. 6 Taunt. 48.]

[Where a licence for non-residence had been obtained previously to 14 July 1814, pursuant to 54 Geo. 3. c. 54., but the allowance by the archbishop-
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op, required by 43 Geo. 3. c. 84. s. 20. is not obtained until after that period; the licence, when ratified, is valid from the time when it was originally granted. 1 Mars. 372. 5 Taunt. 807.]

[Where a benefice belonging to the peculiar of one diocese, is situated within the limits of another, a licence for non-residence need only be registered in the registry of the former. 5 Taunt. 757.]

[Nor, to a curate of an augmented curacy by queen Anne's bounty. B. R. E. 32 Geo. 3. 4 T. R. 665.]

But a gospeller, or a vicar in a cathedral, is not a benefice or dignity, which excuses his residence. Per two J. Cro. El. 663.

[A prebend is a benefice within the statute 48 Geo. 3. c. 84. of non-residence. The truth is, that when the stat. 21 Hen. 8. c. 13. passed, prebendaries were habitually resident on their prebends, and had houses [*] of residence. Now, there are some prebends which have no houses. 2 M. & S. 534.]

[The benefices named in the statute of non-residence, 21 Hen. 8. c. 13. are parsonages and vicarages. Hence, curacies augmented by Queen Anne's bounty (and which are made perpetual cures and benefices by 1 Geo. 1. st. 2. c. 10. s. 4.) are not within it. 4 T. R. 665.]

Yet by the st. 28 H. 8. 13. no person above 40 shall be excused from residence in respect of his studies in the university, unless the chancellor, vice-chancellor, commissary, heads of houses, doctors of the chair, readers of divinity in the schools, or of law, physic, &c. professors of Hebrew, Greek, &c. and persons attending for their degrees.

Nor, under 40, unless they attend lectures, disputations, and exercises according to the statute.

[An action for non-residence under st. 21 Hen. 8. c. 13. cannot be sued before justices of assise, justices of nisi prius, &c. The st. 21 Jac. 1. c. 4. therefore, does not apply to it, since that statute does not controul any of those statutes on which penal actions are to be brought in the superior courts. 3 T. R. 362. 1 H. B. 546.]

[It seems that an action for non-residence under st. 21 Hen. 8. c. 13., may, in the first instance, be sued by attorney. 3 T. R. 362.]

[Under the st. 43 Geo. 3. c. 84., non-residence act, the penalty is a proportion of the annual value according to the length of absence. A declaration on this statute alleged a non-residence for a period of time made up of portions of two calendar years, (that is, year reckoned from first January), viz. nine months from 10th October. Objected, it is not shewn whether the penalty is demanded in respect of the annual value of the one year or the other. Held, that "annual value" meant, as in common parlance, "average value," taking one year with another; otherwise, a late season and an early one might possibly include two harvests within the space of one year. 2 M. & S. 534. 5 Taunt. 2.]

[An averment in an action for a penalty under 48 Geo. 3. c. 84. that the defendant wilfully absented himself from his said benefice, "for a period exceeding eight months together, to wit, on the 10th day of October 1810, and for the space of nine months then next following," must be construed to mean a period exceeding eight months, in a consecutive series, from the 10th October, for the time is defined and made certain by the words "then next following," which were material; and the jury must be presumed to have found that those were the eight months of absence for which they gave their verdict. The argument *e contra* was, here are nine months and a day, out of which the plaintiff might make good the charge of an absence exceeding eight months, and it is uncertain to what particular portion of that time

it relates ; neither does the finding of the jury ascertain it ; and unless the precise portion of time be ascertained, it will be impossible for the defendant to plead it in bar to another action. 2 M. & S. 534. 5 Taunt. 2.]

[Semble, that a certificate granted after 1st July 1814, cannot be pleaded in bar to the action ; but is only available by application to the court to stay the proceedings. 1 Mars. 387. 5 Taunt. 843.]

[Though a licence for non-residence do not cover the whole of the period for which penalties are sought to be recovered, yet, if there be not sufficient time left uncovered to subject the incumbent to a penalty, the court will stay proceedings. 1 Mars. 387. 5 Taunt. 843.]

[*][Relief in proceedings for non-residence not granted before declaration. 5 Taunt. 304.]

[The court refused to extend the relief of 54 Geo. 3. c. 6. to a clergyman sued for non-residence, who had obtained a rule to compound before the act passed. 5 Taunt. 306.]

[In an action against clergymen for non-residence, the acts of the defendant, as parson, and his receipt of the emoluments of the church, are evidence against him of his being parson, without formal proof of his title. 1 N. R. 210. 3 T. R. 635.]

[In a *qui tam* action for non-residence, where the declaration states the defendant to be vicar of A. and he gives evidence that the parish is called B. the entry of the defendant's institution in the bishop's book by the name of A. is not conclusive evidence against him, though it is evidence of the parish being called by both names. Forrest. 117.]

[Under 54 Geo. 3. c. 54. s. 4., the defendant can discontinue an action for non-residence, only upon the terms of paying the costs, as well of the application as otherwise. 5 Taunt. 629.]

[The st. 43 Geo. 3. c. 84. prohibits, under a penalty, a spiritual person from absenting himself from his benefice for more than a certain time in "any one year." The expression, "any one year," does not mean one calendar year, commencing from the 1st January, nor one year from the day of the defendant's induction, but one year before the commencement of a suit for the penalty ; it being the object of the legislature to prevent an absence of more than three months within the period of a year. 2 M. & S. 534. 5 Taunt. 2.]

[Stat. 54 Geo. 3. c. 54., which requires licences to be granted on or before 1st July 1814, does not limit the time within which certificates are to be granted. 1 Mars. 387. 5 Taunt. 843.]

[Such were the doctrines previous to the late act, of which the following is an analysis:]

[Penalties for non-residence. 57 G. 3. c. 99. s. 5.]

[How recovered. Ibid.]

[Where no house upon benefice, what deemed legal residence. Id. s. 6.]

[Houses purchased by governors of Queen Anne's bounty, deemed residences. Id. s. 7.]

[Residence of vicar in rectory house legal. Id. s. 8.]

[Bishop may appoint a house of residence. Id. s. 9.]

[How, and within what limits. Ibid.]

[What persons exempted from the penalties of non-residence. Id. s. 10.]

[Dignitaries of cathedral churches residing upon their dignities, how far exempted. Id. s. 11.]

[Proviso where the year of residence at cathedrals does not commence on the 1st January. Ibid.]

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[Bishop may licence for a longer period, if the duties of the cathedral require it. Id. s. 12.]

Proviso as to prebendaries, &c. appointed before this act. Id. s. 13.]

[House to be kept in repair during non-residence, otherwise the penalties for non-residence incurred. Id. s. 14.]

[Bishop may grant licences for non-residence in certain cases enumerated. Id. s. 15.]

[*]Bishops may also grant licences in other cases, not enumerated. Id. s. 16.]

[Reasons for granting them to be transmitted to archbishop of province. Ibid.]

[Inquiry thereupon. Ibid.]

[Licences null and void by death, &c. of bishop, unless revoked by successor. Id. s. 17.]

[Applications for licences shall be in writing, and state the particulars herein mentioned. Id. s. 18.]

[Licences how granted while see is vacant, &c. Id. s. 19.]

[Licences may be revoked, subject to appeal to archbishop. Id. s. 20.]

[Licences how long in force. Ibid.]

[Copies of licences or revocations to be filed in the registry of diocese. Id. s. 21.]

[Copies transmitted to churchwardens. Ibid.]

[Penalty for default of registrar. Ibid.]

[Copies of licences, &c. read at next visitation. Ibid.]

[A list of licences granted by archbishops, or allowed in cases not enumerated in this act, to be annually transmitted to the king in council, who may revoke any such licence. Id. s. 22.]

[Such orders transmitted to archbishops, and notified to bishops and churchwardens. Ibid.]

[Licences valid between grant and revocation. Ibid.]

[Annual returns to be made to king in council, of residents and non-residents. Id. s. 23.]

[And of curates, &c. ; and whether value of benefice exceeds 300*l.* or not. Ibid.]

[Non-residents, by exemption without licence, shall yearly notify the same to bishop, &c. Penalty for default of making such notification. Id. s. 24.]

[Proviso as to canonical censures for non-residence. Id. s. 25.]

[Where non-residence does not exceed three months, proceeding in ecclesiastical court by bishop only. Ibid.]

[If any unlicensed person does not sufficiently reside, bishop may issue a monition. Id. s. 26.]

[Copy thereof to be filed. Ibid.]

[Return to be made, and upon oath, if so required. Ibid.]

[If return be not made, or be not satisfactory, bishops may sequester benefice, unless monition complied with, and direct the application of profits. Ibid.]

[Appeal against sequestration may be made to the archbishop. Ibid.]

[Appellant to give security for payment of the expences thereof. Ibid.]

[Persons complying with monition shall, notwithstanding, pay costs, &c. Id. s. 27.]

[If any person, returning to residence on monition, shall, before six months

from such his return, absent himself, bishop may sequester profits without monition. Id. s. 28.]

[Bishops may punish past non-residence, as in case of non-compliance with order of residence. Id. s. 29.]

[Penalties may be remitted by archbishops or bishops, but reasons thereof to be transmitted by bishop to archbishop, and by archbishop to king in council. Id. s. 30.]

[*][Archbishop's decision final in cases transmitted by bishop. Ibid.]

[If any spiritual person shall continue under sequestration two years, or incur three sequestrations within that period, the benefice shall be void. Id. s. 31.]

[Contracts for letting house of residence, &c. of benefice, or assigned to curate by bishop, void. Id. s. 32.]

[Penalty for over-holding possession after the day appointed for spiritual person to reside. Ibid.]

[Possession how recovered. Ibid.]

[Spiritual person not liable to penalty while tenant occupies, &c. Id. s. 33.]

[No oath required of vicar relating to residence. Id. s. 34.]

[Penalties not recoverable for more than one year's non-residence. Id. s. 35.]

[Penalties not levied under monition may be recovered by action. Id. s. 36.]

[Actions for penalties not to be commenced before 1st May in the year after the offence. Id. s. 37.]

[Commencement, &c. of year. Id. s. 38.]

[Months how computed under this act. Id. s. 39.]

[Notice of action to be given to defendant, and bishop, a calendar month previous thereto.]

[How such notice shall be. Ibid.]

[Service of such notice to be proved upon trial. Id. s. 41.]

[Evidence confined to cause of action specified in notice. Id. s. 42.]

[Spiritual persons may lodge money by leave of court, before issue joined. Id. s. 43.]

[The court may require the bishop to certify the reputed annual value of benefice, &c. Id. s. 44.]

[Licence may be pleaded in bar of action; and defendant shall have full costs if action discontinued, or double costs if verdict or nonsuit. Id. s. 45.]

[The issuing of monition may be pleaded in bar of action. Id. s. 46.]

[Such plea to be verified by affidavit, unless dispensed with by court. Ibid.]

[No penalty to be levied against the person, where it can be recovered by sequestration within three years.]

(N 5.) By plurality.—When the first church shall be void by it.

By the council of Lateran 1215. 29. *Siquis beneficium cum cura recepit, si prius tale habuerit, eo sit ipso jure privatus: et si in eadem ecclesia plures habeat dignitates aut parsonat, etiamsi curam non habeant, poterit tamen dispensari, &c.*

And therefore, by the canon law received here, if any, having a benefice with cure, accepts another with cure, the first shall be void. R. 4 Co. 75.

Though the second benefice be under 8*l.* per ann. Acc. Vau. 131. Jon. 404.

And therefore the patron, if he will, may present without sentence of deprivation. R. 4 Co. 75. b. R. Cro. Car. 357. Jon. 337.

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And a subsequent dispensation pursuant to the st. .25 H. 8. 21. is too [*]late, and does not take away the right vested in the patron to present. R. Jon. 404.

So now, by the st. 21 H. 8. 13. if any, having a benefice with cure of souls of 8*l.* *per ann.* or above, take any other with cure, and be instituted and inducted, immediately after the first shall be void, and any dispensation, &c. shall be void.

The valuation shall be estimated according to the value returned. 26 H. 8.

So, the first benefice shall be void upon institution to the second, before induction; though a lapse does not incur till six months after induction. Mo. 448.

[A church above 8*l.* is so void on institution to second living, that patron may present immediately. 2 Wils. 174. 3 B. M. 1504.]

[It is also so void, that a grant of the advowson or next presentation made after it is void. Ibid.]

[Acceptance by a beneficed clerk with cure of souls, of another benefice with like cure, *ipso facto* vacates the first, if above 8*l.* yearly, as valued in the king's books. 4 Taunt. 831.]

And it shall be void, though he procures the second benefice to be united to the first, after his institution to the first. Hob. 158.

Though he subscribes the 39 articles, but afterwards does not read them within two months; whereby the second benefice is also void. R. Vau. 131. Vide post, (N 7, 10.)

So, if he takes a dignity, as a deanery, archdeaconry, &c. without a dispensation. Semb. 1 Leo. 316. Vide post, (N 6.)

Or, if a dean takes another dignity.

Or, a dean, prebendary, &c. takes another prebend in the same church.

So, it shall be void to all intents: for he cannot sue for tithes. R. Cro. Car. 357. Jon. 337, 8. 340.

Otherwise, till deprivation, where the former is under 8*l.* *per ann.*

So, a pardon by the king of his title by lapse does not restore him. R. Jon. 339.

So, if the first benefice be under 8*l.* *per ann.* it will be void by the canon law, if he takes a second without a dispensation: and therefore he may be deprived. Vide supra.

How a dispensation for a plurality may be granted, vide in Prerogative, (D 18, &c.)—Vide post, (N 8.)

(N 6.) When not.—If he takes a dignity.

But if a man, having a benefice with cure of 8*l.* *per ann.* with a dispensation, takes a dignity which has no cure, the first is not void: as, if he be made dean of a cathedral. By the st. 21 H. 8. 13.

Or, treasurer, chancellor, prebendary, chaunter of a cathedral or collegiate church. By the st. 21 H. 8. 13.

Or archdeacon.

So, by the same statute, if he takes a parsonage that hath a vicar endowed, or benefice appropriate.

So, if a man, having a benefice with cure, be created a bishop, the benefice is not void by force of that statute, though it be by the common law. Hob. 157.

[*]Neither will it be void by the common law, till he be consecrated a bishop. Pal. 346.

(N 7.) Or is not incumbent of the second.

So, if he is not complete incumbent of the second benefice : as, if a man, having a benefice with cure, takes another benefice with cure, and is inducted, but does not subscribe the thirty-nine articles ; the former is not void, for he never was possessor of the second. Wat. c. 3. Vide ante, (N 5.)—Post, (N 10.)

So, if he be presented to the second by simony. Wat. c. 3.

Or, does not subscribe the articles before the ordinary himself. Wat. c. 3.

(N 8.) If he has a qualification.—Who may have it.

So, by the st. 21 H. 8. 13. brothers, and sons of any temporal lord, or knight, born in wedlock, may purchase a dispensation, to take two parsonages or benefices with cure.

And doctors, and bachelors of divinity, or laws, admitted to the said degrees in any of the universities of this realm, and not by grace only.

So, by the same statute, all spiritual men of the king's council may have a dispensation for three benefices with cure.

And all the chaplains of the king, queen, or any of the king's children, brethren, sisters, uncles, or aunts, may purchase dispensation to take two parsonages or benefices with cure.

[A chaplain extraordinary of the king cannot. Salk. 161.]

So, may six chaplains of any archbishop, or duke.

And five chaplains of any marquis, or earl, and four chaplains of any viscount, or bishop.

And three chaplains of the chancellor of England, of any baron, or knight of the garter.

And two chaplains of any duchess, marchioness, countess, or baroness being widows.

And two chaplains of the king's treasurer, and comptroller of his house, secretary, dean of his chapel, almoner, master of the rolls.

And one chaplain of the chief justice of the king's bench, and warden of the cinque ports.

So, by the st. 26 H. 8. 14. a bishop suffragan.

So, if the king himself presents his chaplain, it is sufficient, without other dispensation : for that imports a dispensation, which the king as supreme ordinary may grant. R. 1 Sal. 161. D. Sav. 135.

So, a chaplain of a duke, marquis, earl, baron, &c. being under the age of discretion, and in ward of him, who has chaplains, may be retained, and qualified by such retainer.

And a qualification before impleading, though it be not before the taking of the second benefice, is sufficient. R. Sav. 135.

If a peer, &c. retains above his number, those first retained only shall be qualified. R. Sav. 101.

If all be retained together, those first advanced.

And the retainer of any one after his number does not avail, though he be first advanced.

Though a former chaplain be advanced, and afterwards dismissed. R. Sav. 79.

[*][On a dispensation to hold two ecclesiastical benefices, the distance by the temporal laws is immaterial. 2 Blk. 969.]

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(N 9.) Who not.

But the presentee of a subject, though qualified, cannot take a plurality, without a dispensation before his institution to the second benefice. R. 1 Sal. 161.

So, a peer, &c. who has several capacities, cannot qualify more than his highest capacity allows.

If a duchess, &c. marries a duke, &c. she cannot afterwards retain, during coverture.

But her chaplains, before retained, continue, if not discharged by the husband.

If a peer, &c. retains above his number, the retainer shall be void; though a former chaplain dies, if he does not retain him *de novo* after the death of the other. Per three J. 1 And. 200.

So, a retainer before he be a peer, &c. is void, though the chaplain afterwards continues in service, if he be not retained *de novo*.

So, a retainer becomes void, if, before his advancement, his master loses his office, &c. or dies, or is attainted.

So, a retainer is of no avail, if he be dismissed before his advancement.

So, a king's chaplain extraordinary is not qualified to take a second benefice. R. 1 Sal. 161, 2.

Nor, a chaplain retained, but not by letters testimonial under hand and seal: as, if they be only signed, or only sealed. Godb. 41.

So, if retained only by parol, though he officiates in the family as chaplain. D. cont. Sav. 135.

So, if the number which he may retain be advanced, the retainer of another afterwards does not give a qualification. R. 1 And. 200.

So, the son of a bishop is not qualified to take a dispensation for two benefices.

Nor, the bastard of a temporal lord.

Nor, the son of a baronet; for it is a dignity created since the statute.

(N 10.) By not reading the thirty-nine articles, &c.

So, by the st. 13 El. 12. if a layman, or a deacon, under the age of twenty-three, be presented and admitted to a benefice with cure, or if any be admitted to a benefice with cure of 30*l.* *per ann.* in the queen's books, unless he be bachelor in divinity, or preacher allowed by some bishop, or university or if any be admitted to a benefice with cure, who shall not have first subscribed the thirty-nine articles in the presence of the ordinary, the admission, &c. shall be void, or if he shall not within two months after his induction publicly read the articles in the church in time of common prayer there, and declare his assent thereto, he shall be *ipso facto* deprived. Vide Ecclesiastical Persons, (C 8.)

By not reading the articles the church is void, without sentence of deprivation. R. Cro. El. 680.

[By st. 23 G. 2. c. 28. persons reading the articles, and declaring their assent thereto, at the time of reading morning and evening prayer, and declaring assent thereto, are within 13 Eliz. c. 12. though not done in two months after induction.]

[*](N 11.) Notice of the avoidance to the patron.

If a church becomes void by resignation or deprivation, a lapse does not incur till notice of the avoidance given to the patron, and six months afterwards elapsed. Vide ante, (H 9.—N 1.)

So, if it becomes void by not reading the 39 articles. By a clause in the st. 13 El. 12.

So, if a lay-patron presents, and the ordinary refuses him, he ought to give notice of the refusal to the patron, if he be refused for a cause within his proper conusance, or of which the judgment belongs to him: as, that he was an heretic, schismatic, &c. Vide ante, (1).

(N 12.) The writ *de vi laica amovenda*.

If a clerk be by force of laymen kept out of his church or parsonage-house, upon application to chancery, he shall have a writ *de vi laica amovenda*, by which the sheriff shall take the *posse comitatus*, and shall attach all who resist, and amove the force. F. N. B. 55. A.

So, upon the bishop's certificate of such force, a writ shall issue. F. N. B. 54. D.

So, the writ shall issue, if the presentee of the king be prevented of his possession. F. N. B. 54. F.

Or, the archdeacon be prevented, by force, from making induction.

The writ *de vi laica amovenda* shall be returnable in B. R. or C. B. F. N. B. 54. G.

Or, it shall not be returnable, at the election of him who sues it. F. N. B. 54. G.

And upon such writ the sheriff ought to remove the force, and put the incumbent into the enjoyment of his possession. F. N. B. 54. H.

So, he may commit the offenders to gaol, and return his writ to B. R., where they shall be fined. Mo. 782.

And if the sheriff does not serve nor return the writ, an *alias pluries*, and attachment lie against him, directed to the coroners. F. N. B. 54. E.

But the sheriff shall not remove the incumbent, whether his possession be by right or by wrong. F. N. B. 54. H.

[And if he does, the incumbent shall have a writ directed to the sheriff, that without delay he may make him amends. F. N. B. 54. H.]

[And if he does not do so, an *alias pluries*, and attachment lie against him. F. N. B. 54. H.]

So, upon an affidavit of it in chancery, restitution shall be awarded. R. Mo. 782.

And in such case the writ shall be returnable in chancery, not in B. R. R. Mo. 782.

[The proprietor of a benefice cannot sue for the profits till he is in possession. In curacies, the party is not in possession till licence. 1 T. R. 401.]

[The words "dues and profits," in stat. 10 Ann. c. 11. s. 16. for dividing of parishes, includes surplice fees, as well as strict fees. 5 Burr. 2762.]

[*]ESQUIRE.

Vide DIGNITY, (B 8.)

ESSOINE.

Vide EXOINE.

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